86 1978

Supreme Court, U.S.
FILED
JUN 8 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1987

JACKSON COUNTY BY AND THROUGH
ITS CHILD SUPPORT ENFORCEMENT
AGENCY **Ex rel.** ANNETTE JACKSON,

Petitioner,

v.

JOHN WESLEY SWAYNEY

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NORTH CAROLINA SUPREME COURT

LACY H. THORNBURG
Attorney General Of North Carolina

Robert E. Cansler
Assistant Attorney General

N.C. Department of Justice
20 South Spruce Street
Suite 207
Asheville, N.C. 28801
Telephone: (704)251-6083

ATTORNEYS FOR PETITIONER

ALPHA GRAPHICS, INC. • WASHINGTON, D.C. • (202) 331-8101

QUESTION PRESENTED

DOES A STATE COURT HAVE SUBJECT MATTER JURISDICTION OVER PATERNITY ACTIONS REQUIRED OF THE STATE BY 42 USC 602, 42 USC 654, AND RELATED FEDERAL LAW AND REGULATIONS TO DETERMINE PATERNITY WHERE THE CHILD, MOTHER, AND RESPONDENT ARE MEMBERS OF A FEDERALLY RECOGNIZED INDIAN TRIBE RESIDING ON THE INDIAN RESERVATION?

PARTIES TO THE PROCEEDINGS

THE PARTIES TO THIS PROCEEDING ARE:

THE JACKSON COUNTY, NORTH CAROLINA CHILD SUPPORT ENFORCEMENT AGENCY, PETITIONER

ANNETTE JACKSON, AN ENROLLED MEMBER OF THE EASTERN BAND OF CHEROKEE INDIANS AND THE MOTHER OF KEVIN JACKSON, A MINOR WHO IS AN ENROLLED MEMBER OF THE EASTERN BAND OF CHEROKEE INDIANS

JOHN WESLEY SWAYNEY, RESPONDENT AN ENROLLED MEMBER OF THE EASTERN BAND OF THE CHEROKEE WHO IS ALLEGED TO BE THE PUTATIVE FATHER OF KEVIN JACKSON.

TABLE OF CONTENT

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

OPINIONS AND JUDGMENT DELIVERED IN THE COURTS BELOW 2

JURISDICTIONAL STATEMENT 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 4

STATEMENT OF THE CASE 5

ARGUMENT ON REASONS FOR GRANTING THE WRIT

A. THIS MATTER INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT 6

B. THE WRIT OF CERTORARI SHOULD BE GRANTED BECAUSE THE COURTS OF LAST RESORT FOR THE STATES OF NORTH CAROLINA, NORTH DAKOTA, AND NEW MEXICO HAVE DECIDED THE FEDERAL QUESTION PRESENTED IN DIFFERENT AND CONFLICTING WAYS 9

CONCLUSION 11

CERTIFICATE OF SERVICE 12

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS INVOLVED

Article III, Section 2, U.S. Constitution 4

FEDERAL CASE LAW

Cherokee Intermarriage Cases, 203 US 76 (1906).....8

Fisher v. District Court, 424 U.S. 382,
47 L.Ed.2d 106 (1976).....8

McClanahan v. Arizona State Tax Commission,
411 US 164, 179, 36 L.Ed.2d 129, 14O (1973).....7

Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C.
467 U.S. 138, 81 L.Ed.2d 113,
104 S.Ct. 2267 (1984).....3

Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C.
476 U.S. _, 90 L.Ed.2d 881,
106 S.Ct. ___ (1986).....3

Williams v. Lee, 358 US 217, 22O, 3L.Ed.2d
251, 254 (1959).....7

FEDERAL STATUTES AND REGULATIONS

25 USC 2.....4

28 USC 1257(3).....3

42 USC 602 3

42 USC 603(h) 5

42 USC 604(d) 5

42 USC 654 3

25 CFR 11.22 4

25 CFR 11.30 4

45 CFR 302.10(a) 4

45 CFR 302.12 4

45 CFR 303.5 4

STATE CASE LAW

Jackson County ex rel. Jackson v. Swayney, 319 N.C. 52, ___ S.E.2d ___ (1987) 10

McKenzie County Social Services Board, S.N.F., through Michon Sax as Guardian Ad Litem , and C.F. v. V.G.. 392 N.W.2d 399 (N.D., 1986). ***cert denied*** U.S. Supreme Court No. 86-996 (1986) 10

Settle v. Beasley, 309 N.C. 616, 308 S.E.2d 288 (1983) 7

State ex rel. Department of Human Services v. Jojola, 99 N.M. 500, 660 P.2d 590 (1983) ***cert. denied*** 464 US 803 9

STATE STATUTES

N.C.G.S. Chapter 110, Article 9 3

N.C.G.S. 110-130 4

N.C.G.S. 110-135 4

N.C.G.S. 110-141 4

MISCELLANEOUS

Rule 17(b),
Rules of the United States
Supreme Court 3

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1987

JACKSON COUNTY BY AND THROUGH
ITS CHILD SUPPORT ENFORCEMENT
AGENCY **Ex rel.** ANNETTE JACKSON,

Petitioner,

v.

JOHN WESLEY SWAYNEY

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NORTH CAROLINA SUPREME COURT

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

The State of North Carolina prays that a Writ of Certiorari issue to review the judgment of the North Carolina Supreme Court entered on February 3, 1987, which affirmed the trial courts finding that North Carolina State Courts lacked subject matter jurisdiction over a federally required paternity action against an Indian living on the Indian reservation.

OPINIONS AND JUDGMENT DELIVERED IN THE COURTS BELOW

The judgment of the Honorable John J. Snow, Jr., North Carolina District Court Judge for the 30th District in Jackson County No. 82-CvD-66 is not a reported judgment. (The judgment is reprinted in full in the appendix hereto) The Jackson County Child Support Enforcement Agency appealed to the North Carolina Court of Appeals. The North Carolina Court of Appeals upheld the judgment of the District Court at 75 N.C. App. 629: ____ S.E.2d ____ (1985) The Jackson County Child Support Enforcement Agency entered Notice of Appeal to the North Carolina Supreme Court on August 5, 1985. The North Carolina Supreme Court affirmed the portion of the opinion of the North Carolina Court of Appeals which found that the State Court lacked subject matter jurisdiction to determine paternity in a proceeding where the child, mother, and alleged putative father were Indians residing on the Indian reservation. The North Carolina Supreme Court reversed the portion of the Court of Appeals opinion holding that the State Court lacked subject matter jurisdiction to collect a debt owed to the State for past public assistance and to obtain a judgment for future child support. The decision of the North Carolina Supreme Court is reported at 319 N.C. 52; ___ S.E.2d ___ (1987) (The decision of the North Carolina Supreme Court is reprinted in the appendix) Respondent filed a timely request for rehearing which was denied on April lO, 1987.

JURISDICTIONAL STATEMENT

A. Proceedings in the State Supreme Court.

The original opinion of the North Carolina Supreme Court was filed on February 3, 1987. denial of a petition for rehearing by respondent was entered on April lO, 1987.

B. Provisions which Confer jurisdiction upon this Court.

This petition is brought under the authority of 28 USC 1257(3) because:

1. the validity of 42 USC 602, 42 USC 654 and their implementing regulations is drawn in question.

2. the validity of Chapter llO, Article 9 of the North Carolina General Statutes is drawn into question on the ground of its being repugnant to the laws of the United States, particularly the body of federal Indian law created by the decisions of the United States Supreme Court.

3. a privilege of immunity from the general authority of the State Courts over it's citizens is claimed under the statutes of or authority exercised under the United States by virtue of the respondent's status as a reservation Indian.

Further, support for this petition is presented by Rule 17(b) of the Rules of the United States Supreme Court. Three State courts of last resort have considered this or similar questions of law and all have reached different conclusions. Compare

a. ***State ex rel. Department of Human Services v Jojola***, 99 N.M. 500, 660 P.2d 590 (1983) cert. denied 464 U.S. 8O3 (holding State Court.has subject matter jurisdiction over child support action against Indian by virtue of 42 USC 6O2)

b. ***McKenzie County Social Services Board v. V.G.*** 392 N.W.2d 399 (N.D. 1986) ***cert. denied*** U.S. Supreme Court No. 86-996, Fall 1986 (holding State Court does not have subject matter jurisdiction over child support action against Indian by virtue of authority of ***Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering***, P.C. 467 U.S. 138, 81 L.Ed.2d 113, lO4 S.Ct. 2267

(1984) and ***Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering***, P.C. 476 U.S. ____, 90 L.Ed.2d 881, 1O6 S.Ct. ___(1986)

c. ***Jackson County ex rel. Jackson v. Swayney***, 319 N.C. 52, ___ S.E.2d ___ (1987) (holding that the State has no subject matter jurisdiction over paternity determinations among Indians but has subject matter jurisdiction over establishment and enforcement of support where paternity is not an issue)

Finally, Article III, Section 2 of the United States Constitution provides the Supreme Court with appellate jurisdiction in all cases in law and equity arising under the laws of the United States. This article seems especially appropriate since the conflict in which the sovereign State of North Carolina finds itself embroiled is created by the conflict between 25 USC 2, 25 CFR 11.22, and 25 CFR 11.3O and 42 USC 602, 42 USC 654, 45 CFR 3O2.10(a), 45 CFR 303.5.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following statutory provisions are reprinted in full in the Statutory Appendix attached:

28 USC 1257
42 USC 602(a)(26) and (27)
42 USC 654
U.S. CONSTITUTION, ART. III, SEC. 2
25 USC 2
25 CFR 11.22
25 CFR 11.30
45 CFR 302.10(a)
45 CFR 303.5
N.C. GEN. STAT. 110-141
N.C. GEN. STAT. 11O-135
N.C. GEN. STAT. 11O-130
45 CFR 302.12

42 USC 6O3(h)
42 USC 6O4(d)

STATEMENT OF THE CASE

Petitioner is Jackson County Child Support Enforcement Agency, an agency operating the Child Support Enforcement Program under the supervision of the North Carolina Department of Human Resources in accordance with federal law pursuant to N.C. Gen. Stat. 110-141. Annette Jackson, an enrolled member Of the Eastern Band of Cherokees, made application for and received Aid for Dependent Children from Jackson County Department of Social Services at the offices of the petitioner located within the exterior boundaries of the reservation of the Eastern Band of Cherokee Indians. By operation of law under N.C. Gen. Stat. 110-135, the actions of Annette Jackson created a debt in the amount of said public assistance due and owing the State of North Carolina by the responsible parent of the child, Kevin Jackson. Annette Jackson alleged under oath that John Wesley Swayney was the biological father of Kevin Jackson. On April 2, 1982, Jackson County filed a complaint against respondent alleging defendant to be the father of Kevin Jackson and seeking to recover the debt owed the State. Kevin Jackson, Annette Jackson, and John Wesley Swayney are members of the Eastern Band of Cherokee Indians and all reside within the ext!rior boundaries of the reservation of the Eastern Band of Cherokee Indians. On July 16, 1984, the District court dismissed petitioner's complaint for lack of personal and subject matter jurisdiction.

Petitioner appealed to the North Carolina Court of Appeals. The Court of Appeals reversed the district court's finding of no personal jurisdiction but affirmed the finding of no subject matter jurisdiction. (printed in the appendix) Petitioner appealed to the North Carolina Supreme Court. The North Carolina Supreme Court concluded that State courts lack subject matter jurisdiction to determine paternity where the child, mother and respondent are members of the

Eastern Band of Cherokee residing on the reservation but do have subject matter jurisdiction to collect a debt owed to the State for past public assistance and to obtain a judgment for future child support. (printed in the appendix) Petitioner files this petition for certorari to obtain review of the determination that state court jurisdiction over paternity actions required by federal law would unduly infringe on tribal self-governance.

Petitioner raised the issue of subject matter jurisdiction by State courts over paternity actions against reservation Indians being required by virtue of the statutory provisions of Title IV-D of the Social Security Act at all stages in the proceedings before the State courts of North Carolina.

The first raising of said issue was at oral argument on defendant's (now respondent) motion to dismiss on July 16, 1984. As oral argument was not recorded or reported, the first reference to said issues in the record was contained in plaintiff-appellant's (now petitioner) brief before the North Carolina Court of Appeals on pages 4 through 6. (printed in the appendix)

ARGUMENT ON REASONS FOR GRANTING THE WRIT

A. THIS MATTER INVOLVES AN IMFORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT.

This case is worthy of consideration by the United States Supreme Courts because the decision will set precedent for other federal programs administered by States within Indian reservations, including but not limited to, Medicaid, unemployment insurance, and aid for dependent children.

All federal "entitlement" programs with which this writer is familiar contain similar language requiring the state to operate the program equally throughout the State. All

federal "entitlement" programs require the State to take legal actions in certain instances, including but not limited to, judicial review of administrative hearings whose outcome is against the applicant, and civil actions against persons suspected of fraud and abuse. All of said federal laws and regulations fail to recognize the existence of "Indian country" within the state's exterior boundaries but upon which the state's authority to regulate the conduct of Indians may be questioned.

Additionally, as is plainly indicated by three petitions for certorari to the United States Supreme Court since 1984, all states which operate child support enforcement programs and contain federally recognized Indian reservations are tossed on the horns of the same dilemma.

The dilemma is presented entirely by the conflicting and competing laws and regulations created by the United States Congress, Courts, and federal administrative agencies.

Essentially, absent governing Acts of congress, the question has always been whether the State action infringed on the right of reservation Indians to make their own laws and be ruled by them. ***Williams v. Lee***, 358 US 217, 220, 3 L.Ed.2d 251, 254 (1959) The test set forth in ***Williams*** is principally applicable to situations involving a non-Indian party. ***McClanahan v. Arizona State Tax Commission***, 411 US 164, 179, 36 L.Ed.2d 129, 14O (1973) Under North Carolina law, the petitioner, Jackson County Child Support Enforcement Agency, is the real party in interest due to Mrs. Jackson's assignment of the right to child support by her acceptance of Aid for Dependent Children benefits. ***See Settle v. Beasley,*** 309 N.C. 616, 3O8 S.E.2d 288 (1983) Under North Carolina law the county in instituting any child support action acts to collect a debt owed the State and United States. ***See*** N.C. Gen. Stat. 110-130 and 110-135.

North Carolina has recognized it's duty with respect to child support enforcement under federal law. ***See*** N.C. Gen. Stat. 110-141. The applicant for Aid for Dependent Children

is required to assign her support rights to the state. 42 USC 6O2(a)(26). The State is required as a condition of federal financial participation in Aid for Dependent Children to operate Child Support Enforcement Program under federal law and regulation. 42 USC 602(a)(27). Said program is to be in ioperation in all political subdivisions of the State. 42 USC 654 Said program is to be in operation on a statewide basis in accordance with equitable standards for administration that are mandatory *throughout the State.* 45 CFR 3O2.10(a) (emphasis added) For all cases, referred to the Child Support Enforcement Program by Aid for Dependent Children Program, the Child Support Enforcement Agency must attempt to establish paternity by court order or legal process established *under State law*; or by acknowledgement if *under the State law* such acknowledgement has the same legal effect as court-ordered paternity. 45 CFR 303.5 (emphasis added) If the State of North Carolina delegates any of the functions of the child support enforcement program to the Cherokee Court of Indian Offenses, North Carolina is required to.secure compliance with the requirements of the State plan by the Cherokee Court of Indian Offenses or the officials of said court. 45 CFR 302.12 North Carolina has no ability to enforce such compliance against an entity created by the United States Department of Interior, Bureau of Indian Affairs pursuant to 25 CFR 11.1 through 25 CFR 11.74. The penalty for violation of the statutes and regulations concerning the Child Support Enforcement Program is loss of federal funding. 42 USC 6O3(h) and 604(d).

On the other hand, the United States Supreme Court has previously applied the infringement test to the question of State subject matter jurisdiction over questions of Indian parentage and ruled in favor of tribal self government. ***See Fisher v. District Court***, 424 U.S. 382, 47 L.Ed.2d 106 (1976) Questions of Indian parentage are often influential or determinative of tribal membership. ***See Cherokee Intermarriage Cases, 203 US 76 (1906)*** Certainly, the tribe has an interest in maintaining control of its own membership.

Further, support to the exclusive control of paternity actions by the tribe is given by 25 CFR 11.22 and 25 CFR 11.3O. The Court of Indian Offenses is given jurisdiction of all suits wherein the defendant is member of the tribe or tribes within their jurisdiction by 25 CFR 11.22. The Court of Indian Offenses is given jurisdiction of all suits brought to determine the paternity of a child and to obtain paternity of a child and to obtain a judgment for the support of the child by 25 CFR 11.30.

The State of North Carolina finds itself in the position of being required to pursue determinations of paternity under State law by federal law and regulations but a finding of a lack of subject matter jurisdiction to do so against reservation Indians based on federal Indian law.

B. THE WRIT OF CERTORARI SHOULD BE GRANTED BECAUSE THE COURTS OF LAST RESORT FOR THE STATES OF NORTH CAROLINA, NORTH DAKOTA, AND NEW MEXICO HAVE DECIDED THE FEDERAL QUESTION PRESENTED IN DIFFERENT AND CONFLICTING WAYS.

Three different state courts of last resort have all applied the infringement test first established by the United States Supreme Court in ***Williams v. Lee***, 358 US 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959) to federally required child support and paternity actions and all three have reached different, separate, and conflicting results.

The first of these three decisions in ***State ex rel. Department of Human Services v. Jojola***, 99 N.M. 500, 660 P.2d 590 (1983) ***cert. denied*** 464 US 8O3. In ***Jojola,*** an Indian mother assigned her right to child support to the Department of Human Services at the time of her application for benefits. During said application, she alleged the Indian defendant was the father of her child. The New Mexico Supreme Court found that, due to the assignment, the action

was a non-Indian v. Indian action required by and conforming with state and federal law and regulations. The New Mexico Supreme Court concluded that the exercise of subject matter jurisdiction over the paternity and child support action filed by the Department of Human Services in State court did not infringe upon the right of reservation Indians to govern themselves as set forth in ***Williams v. Lee, supra***. The New Mexico Supreme Court rejected ***Jojola's*** argument that domestic relations were within the exclusive jurisdiction of the tribe.

The second of these three cases is ***McKenzie County Social Services Board, S.N.F., through Michon Sax as Guardian Ad Litem , and C.F. v. V.G.***, 392 N.W.2d 399 (N.D., 1986). ***cert. denied*** U.S. Supreme Court No. 86-996 (1986).

In ***V.G., id.***, an Indian mother assigned her right to child support to the McKenzie County Board of Social Services at the time of her application for benefits. During said application, she alleged that the Indian defendant was the father of her child. The North Dakota Supreme Court ruled that the action was between Indians despite the federally required assignment. The North Dakota Supreme Court concluded that the exercise of subject matter jurisdiction over the paternity and support action filed by McKenzie County in State Court did infringe upon the right of reservation Indians to govern themselves as set forth in ***Williams v. Lee, supra***. The North Dakota Supreme Court accepted ***V.G.'s*** argument that determination of parentage of a child of Indian tribal members is a matter that is intimately connected with the right of reservation Indians to make their own laws and be ruled by them.

The third of these three decisions is the case at bar, ***Jackson County by and through it's Child Support Enforcement Agency ex rel. Annette Jackson v. John Wesley Swayney,*** 319 N.C. 62, ___ N.E.2d ____ (1987).

In ***Swayney***, an Indian mother assigned her right to child support to Jackson County at the time of her application

for benefits. During her application, she alleged that the Indian defendant was the father of her child. The North Carolina Supreme Court found that, due to her assignment, the action was a non-Indian v. Indian action required by and conforming with state and federal law and regulations. The North Carolina Supreme Court concluded that the exercise of subject matter jurisdiction over the collection of support not involving a determination of paternity did not infringe upon the right of reservation Indians to govern themselves. The exercise of subject matter jurisdiction over the determination of paternity where the mother, child, and defendant are Indians residing on the reservation did infringe on the right of reservation Indians to govern themselves as set forth in ***Williams v. Lee, supra.*** North Carolina Supreme Court partially accepted and partially rejected ***Swayney's*** argument that the determination of paternity and support was within the exclusive jurisdiction of the tribal court by virtue of 25 CFR 11.30.

The State submits that no better example of the need for the application of Rule 17.1(b) of the Rules of the United States Supreme Court can be found than the conflicting results of the above listed three applications of the infringement test laid out in ***Williams v. Lee, supra.***

CONCLUSION

The North Carolina Supreme Court's decision presents an issue with is ripe for decision by the Supreme Court of the United States. Consideration of these issues of competing and conflicting federal law is of vital importance to the several States and is ultimately subject to resolution only by this Honorable Court. For all of the reasons, authorities, and arguments advanced herein, the State respectfully prays that a Writ of Certiorari should issue to review the judgment of the North Carolina Supreme Court herein.

Respectfully submitted,

LACY H. THORNBURG
ATTORNEY GENERAL

Robert E. Cansler
Assistant Attorney General

Counsel for Petitioner
State of North Carolina
N.C. Department of Justice
20 South Spruce Street
Suite 207
Asheville, North Carolina 28801
Telephone: (704)251-6083

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an Assistant Attorney General for the State of North Carolina, and that I have served copies of the foregoing **PETITION FOR WRIT OF CERTIORARI TO THE NORTH CAROLINA SUPREME COURT** by depositing same in the United States mail at Asheville, North Carolina, first class postage prepaid, to:

Creighton W. Sossomon
Attorney for Respondent
Post Office Box 9
Highlands, North Carolina 28741

This the 8th of June, 1987

LACY H. THORNBURG
ATTORNEY GENERAL

Robert E. Cansler
Assistant Attorney General
Attorney for Petitioner

NO. 87-1978

Supreme Court, U.S.
FILED
JUN 8 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term 1987

JACKSON COUNTY BY AND THROUGH ITS CHILD SUPPORT ENFORCEMENT AGENCY Ex rel. ANNETTE JACKSON,

Petitioner,

v.

JOHN WESLEY SWAYNEY

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NORTH CAROLINA SUPREME COURT

APPENDIX

LACY H. THORNBURG
Attorney General Of North Carolina

Robert E. Cansler
Assistant Attorney General

N.C. Department of Justice
20 South Spruce Street
Suite 207
Asheville, N.C. 28801
Telephone: (704)251-6083

ATTORNEYS FOR PETITIONER

ALPHA GRAPHICS, INC. • WASHINGTON, D.C. • (202) 331-8101

TABLE OF CONTENTS

APPENDICES

A.	Complaint	A-1
B.	Answer	A-4
C.	MOTION BY DEFENDANT	A-6
D.	JUDGMENT OF NORTH CAROLINA DISTRICT COURT	A-7
E.	PLAINTIFF-APPELLANT'S BRIEF TO THE NORTH CAROLINA COURT OF APPEALS	A-9
F.	OPINION OF THE NORTH CAROLINA COURT OF APPEALS	A-18
G.	OPINION OF THE NORTH CAROLINA SUPREME COURT	A-22
H.	ORDER DENYING REHEARING	A-34
I.	28 U.S.C. 1257	A-35
J.	42 U.S.C. 602(a)(26)	A-36
K.	42 U.S.C. 602(A)(27)	A-36
L.	42 U.S.C. 654	A-37
M.	UNITED STATES CONSTITUTION, ARTICLE III, SEC. 2	A-46
N.	25 U.S.C. 2	A-47
O.	25 C.F.R. 11.22	A-47
P.	25 C.F.R. 11.30	A-47
Q.	45 C.F.R. 302.10(a)	A-48
R.	45 C.F.R. 303.5	A-48

S. N.C.G.S. 110-141 ..... A-49
T. N.C.G.S. 110-135 ..... A-49
U. N.C.G.S. 110-130 ..... A-50
V. 45 C.F.R. 302.12 ..... A-51
W. 42 U.S.C. 603(h) A-52
X. 42 U.S.C. 604(d) A-54

APPENDIX A

STATE OF NORTH CAROLINA
COUNTY OF JACKSON

JACKSON COUNTY by and through
THE CHILD SUPPORT ENFORCEMENT
AGENCY ex. rel.
ANNETTE JACKSON,

Plaintiff,

vs

JOHN WESLEY SWAYNEY,

Defendant

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION

COMPLAINT

THE PLAINTIFF, complaining of the Defendant, alleges and says:

FIRST CLAIM

I.

That the Plaintiff is a local government body organized and operating under the laws of North Carolina.

II.

That the Defendant is a citizen and resident of Jackson County, North Carolina.

III.

That ANNETTE JACKSON is the mother of the minor child born to her out of wedlock, who according to the certified copy of the birth certificate attached hereto was born on the date and named as follows:

Name	**Date of Birth**
KEVIN JACKSON	January 15, 1976

IV

That the Defendant, JOHN WESLEY SWAYNEY, is the biological father of said minor named in paragraph III above.

V.

That the child of the Defendant listed in paragraph III above is receiving public assistance through The Jackson County Department of Social Services which as of January 31, 1982 totalled Six Thousand Five Hundred, Sixty-six Dollars in the past public assistance paid.

VI.

That because the Defendant's child as listed above has in the past and is presently receiving public assistance, the petitioner is entitled to an adjudication pursuant to Article 9 of Chapter 110 and Article 3 of Chapter 49, that the Defendant is the biological and legal father of the child listed in paragraph III above.

SECOND CLAIM

VII.

The Plaintiff realleges and incorporates by reference the allegations in paragraphs I-IV as set forth above and further says.

VIII.

That the Defendant has refused to adequately contribute to the support and maintenance of the minor child listed in paragraph III above.

IX.

That upon information and belief the Defendant is amply able to pay reasonable sums for the support and maintenance of said child.

X.

That because the Defendant's child as named above has in the past and is presently receiving public assistance, the Plaintiff is, pursuant to Article 9 of Chapter 110 and Article 49,

entitled to an Order obligating the Defendant to pay support for the child named in paragraph III and an order requiring the Defendant to indemnify the State of North Carolina for past public assistance paid to the child named in paragraph III.

WHEREFORE, the Plaintiff prays the Court:

1) That pursuant to the First Claim, the Defendant be adjudicated the father of the minor child, KEVIN JACKSON.

2) That pursuant to Plaintiff's Second Claim, the Defendant be ordered to provide such continuing support and maintenance for said child as may be adequate and reasonable.

3) That pursuant to Plaintiff's Second Claim, the Defendant be ordered to indemnify the State of North Carolina for all past public assistance paid to the Defendant's minor child named in paragraph III, up to the date of the hearing.

4) That all sums paid under the terms of any Order entered be initially made to the Clerk of Superior Court of Jackson County for distribution to the North Carolina Department of Human Resources in accordance with the provisions of Article 9, Chapter 110 of the General Statutes.

5) That the Defendant be taxed with the cost of this action including the share of cost attributable to reasonable Attorney's fees allowed by authority of CS 6-21(10).

6) For such further relief as the Court deems just and proper.

HOLT, HAIRE, BRIDGERS,
& BRYANT, P.A.

/ s / STEVEN J. BRYANT
P.O. Box 248
Bryson City, NC 28713
PH: (704) 488-3950

APPENDIX B

NORTH CAROLINA
JACKSON COUNTY

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
82 CvD 66

JACKSON COUNTY by and through
THE CHILD SUPPORT ENFORCEMENT
AGENCY ex rel
ANNETTE JACKSON,
Plaintiff

vs.

ANSWER

JOHN WESLEY SWAYNE,
Defendant

The Defendant, answering the allegations of Plaintiff's Complaint, says:

FIRST DEFENSE

That this action should be dismissed for failure to state a claim upon which relief may be granted, pursuant to Rule 12(b)(6), N.C. Rules of Civil Procedure.

ANSWER

FIRST CLAIM

1) That the allegations contained in paragraph I and II are admitted.

2) That as to the allegations contained in paragraphs III, V and VI, this Defendant lacks information sufficient to form a response, and the same are, therefore, denied.

3) That the allegations contained in paragraph IV are untrue and are, therefore, denied.

SECOND CLAIM

4) That the allegations contained in paragraph VII are answered in the same manner as paragraphs numbered I through IV are answered above.

5) The allegations contained in paragraphs VIII, IX and X are untrue and are, therefore, denied.

WHEREFORE, Defendant prays the Court as follows:

1) That Plaintiffs have and recover nothing on either of their claims for relief against this Defendant.

2) That the costs of this action be taxed to the Plaintiffs.

3) For a trial by jury.

4) For such other and further relief as to the court seems just and proper.

/ s/ Creighton W. Sossomon
Attorney for Defendant
P.O. Box 188, Sylva, N.C. 28779
Phone: 704-586-5511

APPENDIX C

NORTH CAROLINA
JACKSON COUNTY

GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
File No. 82 CvD 66

JACKSON COUNTY, by and through the Child Support Enforcement Agency, et al

Plaintiff

vs

MOTION

JOHN WESLEY SWAYNEY

Defendant

Now comes the Defendant and, pursuant to the rule 12, NCRCP, moves that this action be dismissed upon the grounds that this Court lacks both personal and subject matter jurisdiction of the Defendant and this action. As cause, Defendant shows that this an action involving the Defendant who is an enrolled member of the Eastern Band of Cherokee Indians and one Annette Jackson, alleging that Defendant is the father of her child; that both Annette Jackson and the minor child are enrolled members of the Eastern Band. That the nominal Plaintiff, Jackson County appears herein only in a representative capacity pursuant to an assignment of rights of support executed in its favor by the said Annette Jackson authorizing it to pursue in her own name. That therefore, this is an action between members of the Eastern Band and as such can only be tried in CFR court, the Court of Indian Offenses of the Eastern Band of Cherokee Indians pursuant to preemptive federal legislation.

This the 11th day of July, 1984.

COWARD, DILLARD, CABLER
SOSSOMON & HICKS, P.A.

By: /s/
Creighton W. Sossoman
Attorney for Defendant
P.O. Box 9,
Highlands, N.C. 28714
704-526-2101

APPENDIX D

STATE OF NORTH CAROLINA
COUNTY OF JACKSON

JACKSON COUNTY by and through
ITS CHILD SUPPORT ENFORCEMENT
AGENCY ex. rel. ANNETTE JACKSON,

Plaintiff,

vs

JOHN WESLEY SWAYNEY,

Defendant

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION

82 CvD 66

JUDGEMENT

THIS CAUSE coming on for hearing upon Motion of Defendant for dismissal pursuant to Civil Rules 12(b)(1) and 12(b)(2), at the July 16, 1984, Jackson County Jury, Non-Jury and Domestic Relations session; the Plaintiff appearing through counsel, W. PAUL HOLT and ROBERT E. CANSLER, and the Defendant appearing through counsel, CREIGHTON W. SOSSOMON: the parties having stipulated to certain facts in open court as follows:

FINDINGS OF FACT

1) The Defendant is an enrolled member of the Eastern Band of Cherokee Indians, and is, and was at all times pertinent hereto a resident of the Eastern Cherokee Indian Reservation.

2) The Defendant was served with Summons and Complaint in this matter by Olga Tahquette of the Cherokee Indian Police Department, and said service was accomplished upon the Defendant within the exterior boundaries of the Eastern Cherokee Indian Reservation.

3) The natural mother of the child whose paternity is at issue, is an enrolled member of the Eastern Band of Cherokee Indians, residents upon the Eastern Cherokee Indian Reservation, who applied for and received AFDC public assistance within the Eastern Cherokee Indian Reservation, and assigned her rights to support for her minor child within the Eastern Cherokee Indian Reservation.

4) The minor child whose paternity is at issue herein is an enrolled member of the Eastern Band of Cherokee Indians and is a resident of the Eastern Cherokee Indian Reservation.

5) The Court of Indian Offenses for the Eastern Band of Cherokee Indians commenced operation on July 28, 1980.

6) The Compliant in this action was filed on April 2, 1982.

7) The natural mother, the minor child and the Defendant herein are enrolled members of the Eastern Band of Cherokee Indians and are Citizens of the State of North Carolina.

Based upon the foregoing findings of fact, the Court now concludes as a matter of law:

CONCLUSIONS OF LAW

1) This Court lacks personal jurisdiction over the Defendant.

EXCEPTION NO. 1

2) That this Court lacks jurisdiction over the subject matter of this action.

EXCEPTION NO. 2

Based upon the foregoing findings of fact and conclusions of law, now therefore it is hereby ordered, adjuged and decreed that this action be and the same is hereby dismissed.

EXCEPTION NO. 3

Entered in open court at Sylva, North Carolina on the 16th day of July, 1984.

Plaintiff, through counsel, gave notice of appeal in open court.

Signed this the 16th day of July, 1984, at Sylva, North Carolina.

/ s / JOHN J. SNOW, JR.
Judge Presiding

APPENDIX E

NO. 8430DC976

NORTH CAROLINA COURT OF APPEALS

JACKSON COUNTY by and through
ITS CHILD SUPPORT ENFORCEMENT
AGENCY ex. rel. ANNETTE JACKSON,

vs

JOHN WESLEY SWAYNEY,

THIRTIETH DISTRICT

FROM JACKSON COUNTY

PLAINTIFF-APPELLANT'S BRIEF

QUESTIONS PRESENTED

I. DID THE DISTRICT COURT ERR IN RULING THAT IT LACKED PERSONAL JURISDICTION OVER A NORTH CAROLINA CITIZEN AND RESIDENT SERVED WITH PROCESS WITHIN NORTH CAROLINA?

II. DID THE DISTRICT COURT ERR IN RULING THAT THE DISTRICT COURT LACKED SUBJECT MATTER JURISDICTION OVER A CIVIL ACTION OF LESS THAN TEN THOUSAND DOLLARS VALUE FILED BY THE JACKSON COUNTY CHILD SUPPORT ENFORCEMENT AGENCY AGAINST A NORTH CAROLINA CITIZEN AND RESIDENT?

III. DID THE DISTRICT COURT ERR IN DISMISSING THE CHILD SUPPORT AND PATERNITY ACTION FILED BY THE PLAINTIFF AGAINST A NORTH CAROLINA CITIZEN?

STATEMENT OF THE CASE

This is an action by the Jackson County Child Support Enforcement Agency to collect a debt owed the State of North Carolina by John Wesley Swayney, the alleged father of Kevin Jackson. Kevin Jackson is a recipient of Aid for Dependent Children. This action was begun by verified complaint on April 2, 1982. Defendant filed a general answer admitting or denying the allegations of plaintiff's compliant without raising any defenses under G.S. § 1-A1, Rule 12(b)(1) and (2). On July 16, 1984, defendant filed a motion to dismiss under G.S. § 1-A1, Rule 12(b)(1) and (2). From an order of the Honorable John J. Snow, Jr., District Court Judge presiding, dated July 16, 1984, and granting defendant's motion to dismiss on both grounds, plaintiff appeals.

STATEMENT OF THE FACTS

Plaintiff is Jackson County Child Support Enforcement Agency, an agent operating the Child Support Enforcement Program under the supervison of the North Carolina Department of Human Resources in accordance with federal law pursuant to G.S. § 110-141. Annette Jackson, an enrolled member of the Eastern Band of Cherokees, made application for and received Aid for Dependent Children from Jackson County Department of Social Services at the offices of the plaintiff located within the exterior boundaries of the reservation of the Eastern Band of Cherokee Indians. (R.p. 14) By operation of the law under G.S. § 110-135, the actions of Annette Jackson created a debt in the amount of said public assistance due and owing the State of North Carolina by the responsible parent of the child, Kevin Jackson. Annette Jackson alleged under oath that John Wesley Swayney was the biological father of Kevin Jackson. (R.p. 2-4) On April 2, 1982, Jackson County filed a complaint against defendant alleging defendant to be the father of Kevin Jackson and seeking to recover the debt owed the State. (R.p. 2) Kevin Jackson, the minor child and John Wesley Swayney, the defendant, are members of the Eastern Band of Cherokee Indians and both reside within the exterior boundaries of the reservation of the

Eastern Band of Cherokee Indians. (R.p. 14) On July 16, 1984, the District Court dismissed plaintiff's complaint for lack of personal and subject matter jurisdiction. (R.p. 15)

ARGUMENTS

I. THE DISTRICT COURT ERRED IN RULING THAT IT LACKED PERSONAL JURISDICTION OVER A NORTH CAROLINA CITIZEN AND RESIDENT SERVED WITH PROCESS WITHIN NORTH CAROLINA.

ASSIGNMENT OF ERROR NO. 1 (R.p. 16)
EXCEPTION NO. 1 (R.p. 14 &16)

Members of the Easten Band of Cherokee Indians enjoy a dual status. Said persons are both citizens of North Carolina and members of a federally recognized Indian tribe. Eastern Band v Lynch, 632 F.2d 373 (4th Cir. 1980). G.S. § 1-75.4, in pertinent part, provides that a court of this State has jurisdiction over a person when the claim arises within the State and process is served upon a natural person who is a party to the action within the State. The Court may take judicial notice of geographical boundaries State v Painter, 261 NC 332, 134 SE2d 638. The plaintiff would ask that the Court take judicial notice that the reservation of the Eastern Band of Cherokees is completely contained with the exterior boundaries of the State of North Carolina. Contrary to the allegations in the defendant's motion to dismiss, the plaintiff has been unable to find any preemptive federal legislation making members of the Eastern Band of Cherokees or members of federally recognized Indian Tribes immune from service of state process on reservations located within the exterior boundaries of the State. Certainly jurisdiction over the person of the defendant may be obtain by his voluntary appearance in the action at bar. Waters v McBee, 244 NC 540, 94 SE2d 640; Re Blalock, 233 NC 493, 64 SE2d 848, 25 ALR2d 818. The defendant filed an answer in the matter on June 13, 1982, without raising any issue of service of process or lack of personal jurisdiction. Under G.S. § 1-75.7, a court of this state may exercise personal jurisdiction over a

person without serving a summons upon him if that person makes a general appearance. An appearance for any purpose other than to question the jurisdiction of the Court is general. Alexiou v O.R.I.P., Ltd., 36 NC App. 246, 243 SE2d 412, cert. denied 295 NC 465, 246 SE2d 215 (1978). Even if the Court lacked personal jurisdiction over the defendant, the Court gained personal jurisdiction over the defendant when the defendant filed his answer on June 13, 1982, without raising the defenses of lack of personal jurisdiction or insufficiency of service of process. See G.S. § 1-A1, Rule 12.

II. THE DISTRICT COURT ERRED IN RULING THAT THE DISTRICT COURT LACKED SUBJECT MATTER JURISDICTION OVER A CIVIL ACTION OF LESS THAN TEN THOUSAND DOLLARS VALUE FILED BY THE JACKSON COUNTY CHILD SUPPORT ENFORCEMENT AGENCY AGAINST A NORTH CAROLINA CITIZEN AND RESIDENT.

ASSIGNMENT OF ERROR NO. 2 (R.p. 16)
EXCEPTION NO. 2 (R.p. 14 & 16)

G.S. § 110-130 provides that any county interested in the paternity of a dependent child may institute civil proceedings against the responsible parent of the child. The matter at bar is a civil action of less than ten thousand dollars as an amount of controversy and is, therefore, subject to the subject matter jurisdiction of the District Court pursuant to G.S. § 7A-243.

The only basis for the decision of the District Court allowing defendant's motion to dismiss for lack of subject matter jurisdiction appears to be the fact that the mother, dependant child, and alleged father are members of the Eastern Band of Cherokee Indians who reside on the reservation of the Eastern Band of Cherokees. In so holding, the District Court apparently relies on the recent decision of this Honorable Court in Wildcatt v Smith, (No. 8330DC773, filed June 19, 1984). As the Honorable John J. Snow, Jr., District Court Judge presiding at the hearing in the matter at bar was the District Court Judge reversed in Wildcatt, id., said reliance is

certainly understandable. The granting of defendant's motion to dismiss in the matter to bar fails, however, the recognize the many distinctions between the Wildcatt matter and the case at bar.

Contrary to assertations contained in defendant's motion to dismiss, plaintiff is "not a nominal plaintiff appearing herein only in a representative capacity pursuant to an assignment of rights of support." (R.p. 13) Plaintiff, Jackson County Child Support Agency, is exercising it's rights and duties under G.S. § 110-130. Plaintiff is not given standing to begin this matter by a mere assignment of rights by a real party in interest, but rather by an act of the North Carolina General Assembly codified at G.S. § 110-135. G.S. § 110-135 provides for the creation of a debt to the State by the acceptance of public assistance by or on behalf of a dependent child. Said debt is in the amount of the public assistance paid, due and owing the State by the responsible parent or parents of the child. G.S. § 110-135, further, provides that the county attorney ". . . shall represent the State in all proceedings brought under this section." Clearly, the county is not a "nominal plaintiff" by virtue of an assignment of right, but rather is the legal representative of the State. The State of North Carolina and, therefore, Jackson County is the real party in interest by virtue of G.S. § 110-135. This point is provided with additional authority by virtue of G.S. § 110-130 which provides that the county may exercise the power of the State by instituting ". . . criminal proceedings against the responsible parent . . ."

Having established that the State of North Carolina is the real party in interest, the most important distinction between the matter at bar and Wildcatt, supra, is obvious. Wildcatt concerns a paternity action between two members of the Eastern Band of Cherokee Indians to determine the paternity of a child, who is also a member of the Eastern Band of Cherokee Indians. Mother, child, and alleged father in Wildcatt, supra, resided on the reservation of the Eastern Band of Cherokees. The State of North Carolina was not a party to the action in Wildcatt and lacked standing to become a party.

This Honorable Court held under the circumstances of Wildcatt, supra:

> "It is clear that any exercise of state power after the creation of the Indians court system would unduly infringe upon the tribe's asserted right of self-government." Wildcatt, supra at page 15

Under G.S. § 8-4, the District Court and this Honorable Court is required to take judicial notice of the laws of the United States. Johnson v Catlett, 246 NC 341, 98 SE2d 458. As is clearly noted in G.S. § 110-129(4) the Child Support Enforcement Program is established and administered pursuant to Article 9 of Chapter 110 of the General Statues and Title IV-D of the Social Secuirty Act. Title IV-D of the Social Security Act is codified at Subchapter Seven, Part D of Title 42 of the United States Code. The Secretary of Health and Human Services is permitted to promulgate rules and regulations governing the Child Support Enforcement Program. Said regulations are published in Chapter Three of Title 45 of the Code of Federal Regulations. The District Court and this Honorable Court are permitted to take judicial notice of federal regulations appearing in the Federal Register which have general application and legal effect. Federal regulations appearing in Chapter Three of Title 45 of the Code of Federal Regulations were initially published in the Federal Register, with some minor exceptions, at 40 FR 27157, June 26, 1975; 40 FR 27159, June 26, 1975; 40 FR 27164, June 26, 1975; 41 FR 55348, December 20, 1976; and 45 FR 8987, February 11, 1980. North Carolina by and through the North Carolina Department of Human Resources, is required to supervise the administration of the Child Support Enforcement Program in accordance with federal law. See G.S. 110-41.

Having established that North Carolina is subject to the provisions of federal law and regulation and that North Carolina Courts may take judicial notice of said law and regulation, the plaintiff now turns to the applicability of said federal law and regulation to the members of the Eastern Band

of Cherokee Indians. The relationship of the United States to the Indian Tribes has been denominated that of a "domestic dependent nation" rather than that of a foreign nation. Their relationship to the United States resembles that of a guardian to his ward. See Cherokee Nation v Georgia, 30 U.S. (5 Pet.) at 17 Usually federal legislation is assumed to be applicable to Indians and their reservations unless specific statutory language or particularized Indian interests indicate to the contrary. See Federal Power Commission v Tuscarora Indian Nation, 362 U.S. 99 (1960) (Congressional Act permitting condemnation of land by power companies, held to permit condemnation of fee lands owned by the Tuscarora Tribe.) Navajo Tribe v National Labor Relations Board, 288 F.2d 162 (D.C. Cir.) cert. denied 366 U.S. 928 (1961) (NLRA held applicable to non-Indian employer in Indian Country) but compare United States v White, 508 F.2d 453 (8th Cir., 1974) (held federal law prohibiting hunting of eagles inapplicable to Indian treaty lands) Fort Apache Timber Co., 226 N.L.R.B. 503, 93 L.R.R.M. 1296(1976) (National Labor Relations Act inapplicable where tribe is the employer) The validity of a federal regulation depends upon its being within the statutory authority conferred by Congress upon the regulating agency. See Rincon Band of Mission Indians v County of San Diego, 324 F. Supp. 371 (S.D. Cal. 1971) aff'd on other grounds, 495 F.2d 1 (9th Cir) cert. denied 419 U.S. 1008 (1974) (held invalid 25 CFR 1.4 excluding land use regulations of state and local government from being applied to trust lands leased from a tribe) Compare Santa Rosa Band v Kings County, 532 F.2d 65[illegible]-67 91975) cert. denied 429 U.S. 1038 (1977) (same regulation upheld as to lands held by Secretary of Interior for Indians under 25 USC 465).

As the applicability of federal law should be assumed unless said applicability infringes upon particularized Indian interests, we should examine the balance of interests. Of course, the Indian interest is the Tribe's right of self-government as asserted by the defendant. Williams v Lee, 358 U.S. 217 (1959) Wildcatt v Smitt, supra The plaintiff's interest is in the viability

of the State and federal public assistance program. Indeed, the plaintiff's interest may well be the survival of the Aid for Dependent Children Program in North Carolina. The applicant for Aid for Dependent Children is required to assign her support rights to the State. 42 USC 602(26)(a) The State is required as a condition of federal financial participation in Aid for Dependent Children to operate a Child Support Enforcement Program under federal law and regulation. 42 USC 602(27) Said program is to be in a operation in all political subdivisions of the State. 42 USC 654 Said program is to be in operation on a statewide basis in accordance with equitable standards for administration that are mandatory throughout the State. 45 CFR 302.10(a) (emphasis added) For all cases, referred to the Child Support Enforcement Program by the Aid for Dependent Child Program, the Child Support Enforcement Agency must attempt to establish paternity by court order or legal process established under State law; or by acknowledgement if under the State law such acknowledgement has the same legal effect as court-ordered paternity. 45 CFR 303.5 (emphasis added) The federal regulations creating the Court of Indian offenses for the Eastern Band of Cherokees and setting forth the authority of said court are found at 25 CFR 11.1 through 11.74. While the Eastern Band of Cherokees and the Department of Interior, Bureau of Indian Affairs could adopt regulations tracking applicable applicable State laws under 25 CFR 11.74 or the Court of Indian Offenses could apply state law under 25 CFR 11.23, it would appear that such action would not permit the State to comply with 45 CFR 302.10 and 303.5. If the State of North Carolina delegates any of the functions of the Child Support Enforcement Program to the Cherokee Court of Indian Offenses, the State of North Carolina is required to secure compliance with the requirements of the State plan by the Cherokee Court of Indian Offenses or the officials of said court. 45 CFR 302.12 Obviously, North Carolina has no ability to enforce such compliance aginst an entity created by the United States Department of Interior, Bureau of Indian Affairs and operated under the provisions of 25 CFR 11.1 through 11.74. The penalty for violation of the rules found in Chapter

III of Title 45 of the Code of Federal Regulations is, of course, loss of federal funding. 42 USC 403(h) and 404(d). Clearly, the tribal interest in self-government must in this incidence give way to the application of federal law and regulation and, therefore, to the subject matter jurisdiction of the North Carolina District Court.

Finally, the plaintiff would observe that the precise issue of the tribe's right to regulate the domestic affairs of the tribe in contrast with the State's right to protect the State and federal public assistance program was decided in favor of the State in the same context as the matter at bar in State of New Mexico ex rel Department of Human Services v Jojola, 99 N.M. 500, 660 P.2d 590 cert. denied US, 104 S.C. 49 (1984) (official reporter citations unavailable) This case appears squarely on point with reference to subject matter jurisdiction, although it is clearly inapplicable to the issue of personal jurisdiction raised in Assignment of Error No. 1 above.

III. THE DISTRICT COURT ERRED IN DISMISSING THE CHILD SUPPORT AND PATERNITY ACTION FILED BY THE PLAINTIFF AGAINST A NORTH CAROLINA CITIZEN.

ASSIGNMENT OF ERROR NO. 3 (R.p. 16)
EXCEPTION NO. 3 (R.p. 14 & 16)

The only issued properly before this Honorable court are the issued raised by defendant's motion to dismiss under G.S. § 1-A1, Rule 12(b)(1) and (2). The plaintiff renews the arguments advanced in the preceeding portions of plaintiff's brief on the issues of personal jurisdiction and subject matter jurisdiction. If the District Court has both personal jurisdiction over the defendant and subject matter jurisdiction over the matter at bar, then the District Court erred in granting defendant's motion to dismiss under G.S. § 1-A, Rule 12(b)(1) and (2).

RUFUS L. EDMISTEN
ATTORNEY GENERAL

/s/Robert E. Cansler
Assistant Attorney General
c/o DHR, Western Regional Office
Building 17/DSS
Black Mountain, North Carolina 28711
(704) 669-3301

APPENDIX F

No. 8430DC976

NORTH CAROLINA COURT OF APPEALS

Filed: 2 July 1985

JACKSON COUNTY By and Through its CHILD SUPPORT ENFORCEMENT AGENCY, Ex-rel. ANNETTE JACKSON

Jackson County
82CVD66

v.

JOHN WESLEY SWAYNEY

Appeal by plaintiff from Snow, Judge. Judgment entered 16 July 1984 in District Court, Jackson County. Heard in the Court of Appeals 18 April 1985.

In April 1982 plaintiff, the Jackson County Child Support Enforcement Agency, filed a civil action to have defendant adjudicated the father of Kevin Jackson and to collect a debt owed to the State of North Carolina for past public assistance paid for Kevin's benefit, a recipient of Aid for Dependent Children. Annette Jackson, Kevin's mother, swore under oath that defendant was the biological father of Kevin Jackson.

Defendant filed a general answer denying the material allegations contained in the complaint, without raising any defenses pursuant to G.S. 1A-1, Rule 12(b)(1) and (2). On 16 July 1984 defendant filed a motion to dismiss pursuant to G.S. 1A-1, Rule 12(b)(1) and (2). From an Order granting defendant's motion to dismiss on both grounds, plaintiff appealed.

Attorney General Edmisten, by Assistant Attorney General Robert E. Cansler for plaintiff-appellant.

Coward, Dillard, Cabler, Sossomon & Hicks, P.A. by Creighton W. Sossoman for defendant-appellee.

PARKER, Judge.

The sole issue presented on this appeal is whether the trial court lacked subject matter jurisdiction to decide this case on its merits. Defendant waived his right to contest lack of

personal jurisdiction when he filed his answer without raising this defense. G.S. 1A-1, Rule 12(h)(2). Lack of subject matter jurisdiction may always be raised by a party, or the court may raise such defect on its own initiative, even after an answer has been filed. G.S. 1A-1, Rule 12(h)(1); Dale v. Lattimore, 12 N.C. App.348, 183 S.E. 2d 417 *cert. denied,* 279 N.C. 619, 184 S.E. 2 113 (1971).

Defendant contends the court lacked the necessary subject matter jurisdiction because he, Annette Jackson and the minor child are members of the Eastern Band of Cherokee Indians and all three reside within the exterior boundaries of their reservation. Defendant contends that this domestic issue may be litigated only in the Court of Indian Offenses of the Eastern Band of Cherokee Indians. Plaintiff, however, contends that pursuant to G.S. 110-130, it, not Annette Jackson is the real party of interest and has an independant right to institute civil proceedings in our state courts against the responsible parent or to any child to whom it has furnished public assistance.

Only one North Carolina case involving litigation against a member of the Eastern Band of Cherokee Indians which lives on the reservation has been decided by our appellate court. In Wildcatt v. Smith, 69 N.C. App. 1, 316 S.E. 2d 870 (1984), *pet. disc. rev. allowed,* 312 N.C. 90, 321 S.E. 2d 909 (1984), appeal withdrawn 4 Dec. 1984, this Court discussed the two pronged infringement-preemption test to determine state court jurisdiction in a paternity suit between two members of the Eastern Band of Cherokee Indians and concluded the District Court was without jurisdiction, after the creation of the Court of Indian Offenses on 28 July 1980, to hold defendant in contempt of a child support order obtained in state court. The Court stated:

> It is clear that any exercise of state power after the creation of the Indian court system would unduly infringe upon the tribe's asserted right of self-government. 69 N.C. App. at 11; 316 S.E.2d at 877.

The principal of federal preemption is well established, and federal power to regulate Indian affairs is plenary and supreme. United States v. Mazurie, 419 U.S. 544, 95 S.Ct. 710, 42 L. Ed. 2d 706 (1975). The States generally have only such power over Indian affairs on a reservation as is granted by Congress, Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 8 L. Ed. 843 (1832), while the tribes retain powers inherent to a sovereign state, except as qualified and limited by Congress. United States v. Wheeler, 435 U.S. 313, 98 S.Ct. 1079, 55 L. Ed 2d 303 (1978). An examination of appropriate federal laws and regulations reveals that our state court's subject matter jurisdiction to entertain these domestic actions has been preempted by federal enactments.

The enabling legislation for these tribal courts is contained in 25 C.F.R. § 11.22 (1984), which states:

> The Court of Indian Offenses shall have jurisdiction of all suits wherein the *defendant* is a member of the tribe or tribes within their jurisdiction.... (emphasis added)

It is clear from this section that it is the membership status of the defendant that controls the proper forum for litigation. The plaintiff's status is not relevant, making it unnecessary to determine whether the plaintiff or Annette Jackson is the real party in interest in this action.

In addition, in a section entitled Domestic Relations, the following appears under 25 C.F.R. § 11.30 (1984):

> The Court of Indian Offenses shall have jurisdiction of all suits brought to determine the paternity of a child and to obtain a judgment for the support of the child.

The present civil action sought to have defendant adjudicated the father of Kevin Jackson and to obtain a judgment for the past public assistance paid to support this child.

Therefore, after considering the well established rules of federal preemption, in conjunction with the two specific

federal regulations quoted above which address precisely these issues sought to be litigated below, we hold that plaintiff must litigate this matter in the Court of Indian Offenses, and that our Courts of General Justice lack the necessary subject matter jurisdiction where the defendant is a member of the Eastern Band of Cherokee Indians who resides on the reservation.

The judgment appealed from is
Affirmed.
Judge BECTON concurs.
Judge WEBB dissents.

Judge WEBB dissenting:

I dissent. Our Supreme Court in Settle v. Beasley, 309 N.C. 616, 308 S.E. 2d 288 (1983), held that an action brought by a Department of Social Services under Article 3 of Chapter 49 of the General Statutes is a separate and distinct action from an action brought by the child or mother of the child. The plaintiff in this case is not an Indian and does not live on an Indian reservation. I do not believe the plaintiff is preempted in this case by any federal statute from suing an Indian in a state court.

I vote to reverse.

APPENDIX G

JACKSON COUNTY BY AND THROUGH ITS CHILD SUPPORT ENFORCEMENT AGENCY, EX REL. ANNETTE JACKSON v. JOHN WESLEY SWAYNEY

No. 461A85

(Filed 3 February 1987)

1. **Indians § 1— public assistance, future child support, and paternity—actions involving Cherokee Indians—no federal preemption**

Federal laws and regulations did not preempt the exercise of state court subject matter jurisdiction over actions to establish paternity, to collect a debt to the State for past. AFDC payments, and to obtain future child support involving a mother, child and putative father who are all members of the Eastern Band of Cherokee Indians residing on the Indian reservation.

2. **Indians § 1— past public assistance and future child support—action against a Cherokee Indian—jurisdiction of state court**

The exercise of state court jurisdiction over actions against a Cherokee Indian living on the Indian reservation to recover debts for the payment of past public assistance under the AFDC program and to secure payments for future child support mandated by the AFDC program does not unduly infringe on the self-governance of the Eastern Band of Cherokee Indians, and state courts thus have subject matter jurisdiction over such actions.

3. Indians § 1— paternity action involving Cherokee Indians—lack of jurisdiction in state court

The exercise of state court jurisdiction over a paternity action when the mother, child and putative father are all members of the Eastern Band of Cherokee Indians living on the reservation unduly infringes on tribal self-governance, and the state courts thus lack subject matter jurisdiction of such an action.

Justices WEBB and WHICHARD did not participate in the consideration or decision of this case.

APPEAL by plaintiff from the decision of a divided panel of the Court of Appeals, 75 N.C. App. 629, 331 S.E. 2d 145 (1985), affirming an order granting defendant's motion to dismiss pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure by *Snow, J.*, at the 16 July 1984 Civil Session of Superior Court, JACKSON County. Heard in the Supreme Court 18 December 1985.

Lacy H. Thornburg, Attorney General, by Robert E. Cansler, Assistant Attorney General, for plaintiff-appellant.

Coward, Dillard, Cabler, Sossomon & Hicks, by Creighton W. Sossomon, for defendant-appellee.

FRYE, Justice.

On 2 April 1982, plaintiff, by and through its Child Support Enforcement Agency, brought suit against defendant seeking to have him adjudicated the father of minor Kevin Jackson, to collect a debt owed to the State for past public assistance,[1] Aid to Families with Dependent Children (AFDC), paid for the minor's benefit, and to obtain an order requiring defendant to make future payments of support for the child. Annette Jackson, mother of Kevin Jackson, stated under oath that defendant is the biological father of her child. Defendant, Ms. Jackson, and Kevin are all members of the Eastern Band of Cherokee Indians residing on the Indian reservation. The office of the Jackson County Department of Social Services where Ms. Jackson applied for AFDC benefits

1. By accepting public assistance on behalf of a dependent child, the recipient is deemed to have made an assignment to the State or to the county from which such assistance was received and the State or county is subrogated to the right of the child or the person having custody to initiate a support action. N.C.G.S. § 110-137 (1978 & Cum. Supp. 1985).

and assigned her rights to support for her minor child is located within the exterior boundaries of the reservation.

Defendant filed a general answer to plaintiff's complaint but failed to raise any defenses under N.C.G.S. § 1A-1, Rule 12(b)(1) (lack of subject matter jurisdiction and (2) (lack of personal jurisdiction). Defendant filed a subsequent motion to dismiss pursuant to Rule 12(b)(1) and (2). This motion was granted by the trial court on 16 July 1984.

Plaintiff appealed to the Court of Appeals which affirmed the decision of the lower court as to dismissal on the Rule 12(b)(1) motion only. The Court of Appeals held that since defendant did not raise the 12(b)(2) motion before or with his answer, he was deemed to have waived his objection to the State's exercise of personal jurisdiction over him. On the issue of subject matter jurisdiction, the Court of Appeals found that federal law, 25 C.F.R. §§ 11.22 and 11.30, preempted State jurisdiction in this case. The court held that "after considering the well established rules of federal preemption, in conjunction with the two specific federal regulations . . . we hold that plaintiff must litigate this matter in the Court of Indian Offenses, and that our Courts of General Justice lack the necessary subject matter jurisdiction where the defendant is a member of the Eastern Band of Cherokee Indians who resides on the reservation." Plaintiff appeals the decision of the Court of Appeals pursuant to N.C.G.S. § 7A-30(2).

Plaintiff contends that the Court of Appeals erred in holding that the trial court lacked subject matter jurisdiction in this case where the defendant is a member of the Eastern Band of Cherokee Indians and resides on the Indian reservation because there are compelling reasons to require state jurisdiction in cases of this nature. Defendant argues that state jurisdiction in this case has been preempted by federal law, and therefore the matter is exclusively within the province of the Eastern Band's Court of Indian Offenses.[2]

I.

While the subject of Indian law is broad and "generalizations on this subject have become treacherous," *Mescalero Apache*

---

2. The Court of Indian Offenses for the Eastern Band of Cherokee Indians commenced operation on 28 July 1980.

Tribe v. Jones, 411 U.S. 145, 148, 36 L.Ed. 2d 114, 119 (1973), there are several basic principles which have been set forth by the United States Supreme Court in numerous decisions with respect to the boundaries between state regulatory authority and tribal self-government. In *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 65 L.Ed. 2d 665 (1980), the Court stated:

> Long ago the Court departed from Mr. Chief Justice Marshall's view that 'the laws of [a state] can have no force' within reservation boundaries. At the same time we have recognized that the Indian tribes retain 'attributes of sovereignty over both their members and their territory.' As a result, there is no rigid rule by which to resolve the question whether a particular state law may be applied to an Indian reservation or to tribal members. The status of the tribes has been described as 'an anomalous one and of complex character,' for despite their partial assimilation into American culture, the tribes have retained 'a semi-independent position . . . not as States, not as nations, not as possessed of the full attributes of sovereignty, but as *a separate people, with the power of regulating their internal and social relations*, and thus far not brought under the laws of the Union or of the State within whose limits they reside.'
>
> Congress has broad power to regulate tribal affairs under the Indian Commerce Clause, Art. 1, § 8, cl. 3. This congressional authority and the 'semi-independent position' of Indian tribes have given rise to two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members. *First, the exercise of such authority may be pre-empted by federal law. Second, it may unlawfully infringe 'on the right of reservation Indians to make their own laws and be ruled by them.'* The two barriers are independent because either, standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members. They are related, however, in two important ways. The right of tribal self-government is ultimately dependent on and subject to the broad power of Congress. Even so, traditional notions of Indian self-government are so deeply engrained in our jurisprudence that they have provided an important 'back drop'

against which vague or ambiguous federal enactments must always be measured. (Citations omitted.) (Emphases added.)

II.

A.

[1] We consider first whether the exercise of state-court jurisdiction in this case is preempted by federal law. The United States Supreme Court has "rejected the proposition that in order to find a particular state law to have been preempted by operation of federal law, an express congressional statement to that effect is required." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144, 65 L.Ed. 2d 665, 673. Rather, the State's power over Indian tribes must be determined in light of the federal government's plenary power over all Indians. *Wildcatt v. Smith*, 69 N.C. App. 1, 6, 316 S.E. 2d 870, 873 (1984). State action may be barred upon a showing of congressional intent to "occupy the field" and prohibit parallel state action. *Id. See also In re Halloway*, No. 20519 (Utah Dec. 5, 1986) (Lexis, Utah library, Utah file).

Defendant cites no federal statutes but refers us instead to two federal regulations which he contends preempt the exercise of state court subject matter jurisdiction in the case *sub judice*.

25 C.F.R. § 11.22 *Jurisdiction* provides:

> The Court of Indian Offenses shall have jurisdiction of all suits wherein the defendant is a member of the tribe or tribes within their jurisdiction, and of all other suits between members and non-members which are brought before the courts by stipulation of both parties. No judgment shall be given on any suit unless the defendant has actually received notice of such suit and ample opportunity to appear in court in his defense . . . .

25 C.F.R. § 11.22 (1986).

25 C.F.R. § 11.30 *Determination of paternity and support* provides:

> The Court of Indian Offenses shall have jurisdiction of all suits brought to determine the paternity of a child and to obtain a judgment for the support of the child. A judgment of the court establishing the identity of the father of the child

shall be conclusive of that fact in all subsequent determinations of inheritance by the Department of the Interior or by the Court of Indian Offenses.[3]

25 C.F.R. § 11.30 (1986).

Defendant contends that these two regulations establish the exclusive jurisdiction of the Court of Indian Offenses over all of the claims brought against him by the State. He emphasizes the parallel wording found in both regulations, that the Court of Indian Offenses "shall have jurisdiction of *all* suits . . . ." 25 C.F.R. §§ 11.22 and 11.30 (1986). He interprets this wording as depriving the State courts of subject matter jurisdiction in the instant case. The language of these regulations, defendant contends, clearly shows that the intent of Congress was to preempt the entire field of jurisdiction of state courts over Indian defendants in civil actions, once the Tribal Court system is mobilized.

We do not agree. These two regulations form part of the enabling legislation of the Court of Indian Offenses. We believe that these regulations merely enable the Court of Indian Offenses to exercise original jurisdiction over the various types of actions and categories of people described therein. We do not find that these enabling regulations, standing alone, are so pervasive as to "occupy the field" in this area and accordingly preempt the State from exercising any jurisdiction that it may already lawfully possess. Nor do we believe that the mere establishment of such a court necessarily deprives the State of all such jurisdiction. *Contra, Wildcatt v. Smith*, 69 N.C. App. 1, 316 S.E. 2d 870.

B.

As a general proposition, the states have only such power over the affairs of Indians living on a reservation as is granted by Congress. *See* Bridgers, *An Historical Analysis of the Legal Status of the North Carolina Cherokees*, 58 N.C.L. Rev. 1075, 1129 (1980). However, the Treaty of New Echota, 29 December 1835, United States—Cherokee Indians, 7 Stat. 478 (ceding all remain-

---

3. Federal regulations 25 C.F.R. §§ 11.22 and 11.30 were drafted under authority granted by Congress in 25 U.S.C. § 2 (1832) which provides that "the Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the president may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations."

ing Cherokee territory east of the Mississippi) gave the State of North Carolina jurisdiction over the individuals and families who remained in the State when the rest of the Cherokee were removed to Oklahoma. *Eastern Band of Cherokee Indians v. United States*, 117 U.S. 288, 29 L.Ed. 880 (1866) ("The Cherokee Trust Funds"). While subsequent federal action has clearly eroded the State's ability to exercise this jurisdiction, *see Eastern Band of Cherokee Indians v. Lynch*, 632 F. 2d 373, 377-78 (4th Cir. 1980) (cites several areas where federal law currently preemepts state action), nothing presently before this Court convinces us that federal law preempts the exercise of subject matter jurisdiction by this State's courts in the instant case.[4] We therefore disagree with the Court of Appeals' conclusion that federal law preempts the exercise of subject matter jurisdiction by our State courts in this case.

C.

Having disposed of the doctrine of federal preemption as a barrier, we next consider whether the exercise of state court jurisdiction unduly infringes[5] on the self-governance of the Eastern Band of Cherokee Indians. The appropriate test is stated in *Williams v. Lee*, 358 U.S. 217, 220, 3 L.Ed. 2d 251, 254 (1959), which provides that:

> Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of the reservation Indians to make their own laws and be ruled by them.

The *Williams* test is principally applicable in situations involving a non-Indian party.[6] *McClanahan v. Arizona State Tax*

---

4. Neither Public Law 280 (ceding to various states criminal and civil jurisdiction over named Indian tribes and providing a mechanism for other states to obtain jurisdiction over reservation Indians within their boundaries) nor Title IV of the 1968 Indian Civil Rights Act (repealing portions of Public Law 280 and substituting a different mechanism for the extension of state jurisdiction) divested states of jurisdiction properly assumed prior to the enactment of the statute. *Three Affiliated Tribes v. Wold Engineering*, 467 U.S. 138, 81 L.Ed. 2d 113 (1984).

5. This has been commonly referred to as the infringement test. *See* S. Sherick, *State Jurisdiction Over Indians As A Subject of Federal Common Law: The Infringement-Preemption Test*, 21 Ariz. L. Rev. 85 (1979).

6. The instant case involves an Indian defendant and a non-Indian plaintiff (Jackson County). Ms. Jackson's right to child support was assigned to the county

Commission, 411 U.S. 164, 179, 36 L.Ed. 2d 129, 140 (1973). "In these situations, both the tribe and the state could fairly claim an interest in asserting their respective jurisdictions." *Id.* This infringement test "was designed to resolve the conflict by providing that the State could protect its interest up to the point where tribal self-government would be affected." *Id.*

In *New Mexico ex rel. Dept. of Human Services v. Jojola*, 99 N.M. 500, 660 P. 2d 590, *cert. denied*, 464 U.S. 803, 78 L.Ed. 2d 69 (1984), the New Mexico Supreme Court held that the state court had subject matter jurisdiction over an action by the New Mexico Department of Human Services (DHS) to determine whether an Indian defendant was the natural father of a minor child and to require defendant to make monthly child support payments. The court, applying the *Williams* test, found no Acts of Congress governing jurisdiction in the case, and therefore proceeded to determine whether the state action infringed on the right of the reservation Indians to make their own laws and be ruled by them. Three criteria were found to bear on the question of state court jurisdiction: (1) whether the parties are Indians or non-Indians, (2) whether the cause of action arose within the Indian reservation, and (3) the nature of the interest to be protected. *Id.* at 502-3, 660 P. 2d at 592. The court in *Jojola* found that the action involved an Indian defendant and a non-Indian plaintiff (DHS), since the natural mother assigned her right to support to DHS when she accepted public assistance. The cause of action arose outside of the Indian reservation when "[the mother] filed and obtained public assistance and assigned her support rights to DHS." *Id.* at 503, 660 P. 2d at 593. The court then balanced the interest of the Indians (to govern themselves) against that of the State (the uniform enforcement of the AFDC program in New Mexico) and found no interference with the tribe's interest on the part of the state.

We consider the three criteria used by the New Mexico Supreme Court to be instructive on the issue of infringement. In this case, like *Jojola*, the plaintiff, Jackson County, is a non-Indian, and the defendant is an Indian. With respect to the second criterion, however, we are not persuaded by the New Mexico

---

when she accepted AFDC benefits. *See Settle v. Beasley*, 309 N.C. 616, 308 S.E. 2d 288 (1983).

court's reliance on the fact that the cause of action arose outside of the reservation when the mother filed and obtained public assistance and assigned her support rights to DHS. The foundation for the cause of action in both *Jojola* and the case *sub judice* is the determination of parentage; for unless defendant is the father of the child, there is no basis for fequiring him to pay child support or reimburse the State for payments made by it. In any event, in the instant case, even the application for benefits was executed by the mother at the social services office on the reservation where the mother, the child and the defendant resided.

The final consideration requires a weighing of the relative interests affected by the exércise of state court jurisdiction. Plaintiff asserts as its interest the maintenance of the AFDC program in this State, while the interest asserted by the defendant is that of tribal self-governance. For purposes of considering the relative interests in this case, we find it necessary to consider separately the causes of action: (1) to determine the paternity of a child where the defendant is an Indian living on the reservation; and (2) to collect a debt owed to the State for past public assistance and to obtain a judgment for future child support.

[2] We first consider the jurisdiction of state courts over actions to collect debts owed to the State for public assistance. As a condition of participation in the AFDC program, the State must operate a Child Support Enforcement Program, 42 U.S.C. § 602(27), to secure support for the minor child from his natural parents or from any other person legally liable for the child's support. This program must be operated on a statewide basis in accordance with equitable standards fcr administration that are mandatory throughout the State. 45 C.F.R. 302.10(a). However, the Court of Indian Offenses is an entity created and regulated by the federal government. The State of North Carolina is therefore without power to require the tribal court to enforce debts owed to the State from persons legally liable for the child's support. The ultimate penalty for failure to comply with the required enforcement of the AFDC programs is loss of federal funding. The competing interest asserted by the defendant is that of tribal self-governance. However, we find before us nothing which suggests that the tribe's interest in self-governance would be significantly affected by the exercise of concurrent state and tribal court jurisdiction over actions to collect debts lawfully owed to the State.

We find, therefore, that the exercise of state court jurisdiction over causes of action to recover debts for payment of past public assistance does not unduly infringe on the interest of Indian self-governance.

The State's interest in exercising jurisdiction over causes of action for future child support is in essence the same state interest in exercising jurisdiction over actions for debts for payment of past public assistance—to secure payments by persons legally liable for a child's support as mandated by the AFDC program. Thus we find that the State's exercise of jurisdiction over actions for future child support mandated by the AFDC program likewise does not unduly infringe on tribal self-governance.

[3] A more difficult question arises when the state courts attempt to exercise jurisdiction over actions to determine paternity where the defendant is an Indian living on the reservation. The determination of the paternity of an Indian child is of special interest to tribal self-governance, the right of reservation Indians to make their own laws and be governed by them. Such determination strikes at the essence of the tribe's internal and social relations.[7] Thus, exclusive tribal court jurisdiction over the determination of paternity, where the defendant is an Indian living on the reservation, is especially important to tribal self-governance. The State's interest in having this matter litigated in its own courts is less compelling. We are aware that in cases referred to the Child Support Enforcement Program by the AFDC Program when paternity has not yet been established, the State, through its Child Support Enforcement Agency, must attempt to establish paternity by court order or legal process established under State law; or by acknowledgment if under the State law such acknowledgment has the same legal effect as court-ordered paternity. 45 C.F.R. 303.5. However, the State may resort to the Court of Indian Offenses to secure a judgment or order determining the paternity of the child, thus meeting this requirement.

---

7. 25 C.F.R. § 11.30 *Determination of Paternity and Support*, for example, provides that, "A judgment of the Court [of Indian Offenses] establishing the identity of the father of the child shall be conclusive of that fact in all subsequent determinations of *inheritance* by the Department of the Interior or by the Court of Indian Offenses." (Emphasis added.)

In *Fisher v. District Court*, 424 U.S. 382, 47 L.Ed. 2d 106 (1976), the United States Supreme Court, applying the infringement test, held that the exercise of state subject matter jurisdiction over a suit involving an adoption proceeding, where all of the parties were members of the Northern Cheyenne Tribe living on the reservation and the dispute arose on the reservation, interfered with the tribe's power of self-governance.[8] The Court stated:

> State-court jurisdiction plainly would interfere with powers of self-government conferred upon the Northern Cheyenne Tribe and exercised through the Tribal Court. It would subject a dispute arising on the reservation among reservation Indians to a forum other than the one they have established for themselves. As the present record illustrates, it would create a substantial risk of conflicting adjudications affecting the custody of the child and would cause a corresponding decline in the authority of the Tribal Court.

Id. at 387-88, 47 L.Ed. 2d at 112. Both the *Fisher* case and the case *sub judice* involve a civil proceeding requiring the determination of matters of great importance to the internal and social relations of tribal members. In *Fisher*, the cause of action required a determination of the respective rights of the Indian litigants regarding the legal parentage of an Indian child, while the cause of action here requires a determination of the biological parentage of an Indian child. As the Court found in *Fisher*, we find in the instant case that concurrent state and tribal jurisdiction over paternity would create a substantial risk of conflicting adjudication concerning respective rights of Indians living on the reservation and would undermine the authority of the tribal court. We hold, therefore, that the exercise of state court jurisdic-

---

8. We are not unmindful of the fact that a governmental agency is plaintiff in the instant case, whereas in *Fisher* both plaintiff and defendant were Indians. However, the cause of action in both cases requires determination of the respective rights between members of an Indian tribe residing on the reservation. In addition, the Court's reasoning in *Fisher* that a state, in asserting jurisdiction over cases between two Indians, must *at least* meet the same standards for exercising jurisdiction over cases between Indians and non-Indians indicates that the standard for establishing whether jurisdiction infringes on tribal self-governance in the case *sub judice* is not higher than the standard applied by the United States Supreme Court in *Fisher*.

tion over paternity actions where, as here, the mother, the child, and the putative father are all Indians living on the reservation unduly infringes on tribal self-governance.

For all of the reasons stated in this opinion, we conclude that our State courts lack subject matter jurisdiction to determine paternity in the instant case where the child, mother and defendant are members of the Eastern Band of Cherokee Indians residing on the reservation. Once paternity is established, our courts do have subject matter jurisdiction over causes of action brought by the State pursuant to requirements of the AFDC program to collect a debt owed to the State for past public assistance and to obtain a judgment for future child support. The decision of the Court of Appeals is therefore affirmed in part and reversed in part.

This cause is remanded to the Court of Appeals for further remand to the trial court for further proceedings not inconsistent with this opinion. Upon remand, if paternity is contested, the plaintiff may apply to the Superior Court, Jackson County, for a stay of proceedings in that court pending the filing and final disposition of an appropriate proceeding in the Court of Indian Offenses to determine the paternity of the child.

Affirmed in part, reversed in part and remanded.

Justices WEBB and WHICHARD did not participate in the consideration or decision of this case.

APPENDIX H

No. 461A85 THIRTIETH DISTRICT

SUPREME COURT OF NORTH CAROLINA

JACKSON COUNTY By and Through its CHILD SUPPORT ENFORCEMENT AGENCY, Ex-Rel. ANNETTE JACKSON
v.
JOHN WESLEY SWAYNEY

From Jackson (8430DC976)

ORDER

Upon consideration of the petition filed by Defendant in this matter for rehearing of the decision of this Court pursuant to Rule 31, N.C. Rules of Appellate Procedure, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the Court in conference, this the 7th day of April 1987.

s/ Whichard, J.
For the Court"

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 10th day of April 1987.

J. GREGORY WALLACE
Clerk of the Supreme Court

/s/
Assistant Clerk

Copy to:
North Carolina Court of Appeals
Mr. Lacy H. Thornburg, Attorney General, For the Plaintiffs
Mr. Robert E. Cansler, Assistant Attorney General, For the Plaintiffs
Coward, Dillard, Cabler, Sossoman & Hicks, Attorneys at Law, For the Defendant

APPENDIX I

28 U.S.C. § 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

APPENDIX J

42 U.S.C. § 602 (a)

(26) provide that, as a condition of eligibility for aid, each applicant or recipient will be required -

(A) to assign the State any rights to support from any other person such applicant may have (i) in his own behalf or in behalf of any other family member for whom the applicant is applying for or receiving aid, and (ii) which have accrued at the time such assignment is executed.

(B) to cooperate with the State (i) in establishing the paternity of a child born out of wedlock with respect to whom aid is claimed, and (ii) in obtaining support payments for such applicant and for a child with respect to whom such aid is claimed, or in obtaining any other payments or property due such applicant or such child, unless (in either case) such applicant or recipient is found to have good cause for refusing to cooperate as determined by the State agency in accordance with standards prescribed by the Secretary, which standards shall take into consideration the best interest of the child on whose behalf aid is claimed; and that, if the relative with whom a child is living is found to be ineligible because of failure to comply with the requirements of subparagraphs (A) and (B) of this paragraph, any aid for which such child is eligible will be provided in the form of protective payments as described in section 406(b)(2) [42 USCS § 606(b)(2)] (without regard to clauses (A) through (E) of such section);

APPENDIX K

(27) provide that the State has in effect a plan approved under part D of this subchapter and operate a child support program in conformity with such plan.

APPENDIX L

§ 654. State plan for child and spousal support

A State plan for child land spousal support must—

(1) provide that it shall be in effect in all political subdivisions of the State;

(2) provide for financial participation by the State;

(3) provide for the establishment or designation of a single and separate organizational unit, which meets such staffing and organizational requirements as the Secretary may by regulation prescribe, within the State to administer the plan;

(4) provide that such State will undertake—

(A) in the case of a child born out of wedlock with respect to whom an assignment under section 402(a) (26) of this title [42 USCS § 602(a)(26)] is effective, to establish the paternity of such child, unless the agency administering the plan of the State under part A of this title [42 USCS §§ 601 et seq.] determines in accordance with the standards prescribed by the Secretary pursuant to section 402(a)(26)(B) (42 USCS § 602(a)(26)(B)] that it is against the best interests of the child to do so, and

(B) in the case of any child with respect to whom such assignment is effective, including an assignment with respect to a child on whose behalf a State agency is making foster care maintenance payments under part E (42 USCS §§ 670 et seq.], to secure support for such child from his parent (or from any other person legally liable for such support) and, at the option of the State, from such parent for his spouse (or former spouse) receiving aid to families with dependent children (but only if a support obligation has been established with respect to such spouse), utilizing any reciprocal arrangements adopted with other States (unless the agency administering the plan of the State

under part A or E of this title [USCS §§ 601 et seq., 670 et seq.] determines in accordance with the standards prescribed by the Secretary pursuant to section 402(a)(26)(B) [42 USCS 602(a)(26)(B)] that it is against the best interests of the child to do so), except that when such arrangements and other means have proven ineffective, the State may utilize the Federal courts to obtain or enforce court orders for support;

(5) provide that, in any case in which support payments are collected for an individual with respect to whom an assignment under section 402(a)(26) [42 USCS § 602(a)(26)] is effective, such payments shall be made to the State for distribution pursuant to section 457 [42 USCS § 657] and shall not be paid directly to the family, and the individual will be notified at least annually of the amount of the support payments collected; except that this paragraph shall not apply to such payments (except as provided in section 457(c) [42 USCS § 657 (c)]) for any month following the first month in which the amount collected is sufficient to make such family ineligible for assistance under the State plan approved under part A [42 USCS §§ 601 et seq.];

(6) provide that (A) the child support collection or paternity determination services established under the plan shall be make available to any individual not otherwise eligible for such services upon application filed by such individual with the State, including support collection services for the spouse (or former spouse) with whom the absent parent's child is living (but only if a support obligation has been established with respect to such spouse, and only if the support obligation established with respect to the child is being enforced under the plan), (B) an application fee for furnishing such services shall be imposed, which shall be paid by the individual applying for such services, or

recovered from the absent parent, or paid by the State out of its own funds (the payment of which from State funds shall not be considered as an administrative cost of the State for the operation of the plan, and shall be considered income to the program), the amount of which (i) will not exceed $25 (or such higher or lower amount (which shall be uniform for all States) as the Secretary may determine to be appropriate for any fiscal year to reflect increases or decreases in administrative costs), and (ii) may vary among such individuals on the basis of ability to pay (as determined by the State), [and] (C) a fee of not more than $25 may be imposed in any case where the State requests the Secretary of the Treasury to withhold past-due support owed to or on behalf of such individual from a tax refund pursuant to section 464(a)(2) [42 USCS § 664(a)(2)], and (D) any costs in excess of the fees so imposed may be collected—

(i) from the parent who owes the child or spousal support obligation involved, or

(ii) at the option of the State, from the individual to whom such services are made available, but only if such State has in effect a procedure whereby all persons in such State having authority to order child or spousal support are informed that such costs are to be collected from the individual to whom such services were made available;

(7) provide for entering into cooperative arrangements with appropriate courts and law enforcement officials (A) to assist the agency administering the plan, including the entering into of financial arrangements with such courts and officials in order to assure optimum results under such program, and (B) with respect to any other matters of common concern to such courts or officials and the agency administering the plan;

(8) provide that the agency administering the plan will establish a service to locate absent parents utilizing—

(A) all sources of information and available records, and

(B) the Parent Locator Service in the Department of Health and Human Services;

(9) provide that the State will, in accordance with standards prescribed by the Secretary, cooperate with any other State—

(A) in establishing paternity, if necessary,

(B) in locating an absent parent residing in the State (whether or not permanently) against whom any action is being taken under a program established under a plan approved under this part [42 USCS §§ 651 et seq.] in another State,

(C) in securing compliance by an absent parent residing in such State (whether or not permanently) with an order issued by a court of competent jurisdiction against such parent for the support and maintenance of the child or children or the parent of such child or children with respect to whom aid is being provided under the plan of such other State, and

(D) in carrying out other functions required under a plan approved under this part [42 USCS §§ 651 et seq.];

(10) provide that the State will maintain a fund record of collections and disbursements made under the plan and have an adequate reporting system;

(11) provide that amounts collected as support shall be distributed as provided in section 457 [USCS § 657];

(12) provide that any payment required to be made under section 456 or 457 [42 USCS §§ 656, 657] to a family shall be made to the resident parent, legal guardian, or caretaker relative having custody of or responsibility for the child or children;

(13) provide that the State will comply with such other requirements and standards as the Secretary determines to be necessary to the establishment of an effective program for locating absent parents, establishing paternity, obtaining support orders, and collecting support payments;

(14) comply with such bonding requirements, for employees who receive, disburse, handle, or have access to, cash, as the Secretary shall by regulations prescribe;

(15) maintain methods of administration which are designed to assure that persons responsible for handling cash receipts shall not participate in accounting or operating functions which would permit them to conceal in the accounting records the misuse of cash receipts (except that the Secretary shall by regulations provide for exceptions to this requirement in the case of sparsely populated areas where the hiring of unreasonable additional staff would otherwise be necessary);

(16) provide, at the option of the State, for the establishment, in accordance with an (initial and annually updated) advance automatic data processing planning document approved under section 452(d) [42 USCS § 652 (d)], of an automatic data processing and information retrieval system designed effectively and efficiently to assist management in the administration of the State plan, in the State and localities thereof, so as (A) to control, account for, and monitor (i) all the factors in the support enforcement collection and paternity determination process under such plan (including, but not limited to, (I) identifiable correlation factors (such as social security numbers, names, dates of birth, home addresses and mailing addresses (including postal ZIP codes) of any individual with respect to whom support obligations are sought to be established or enforced and with respect to any person to whom such support obligations

are owing to assure sufficient compatibility among the systems of different jurisdictions to permit periodic screening to determine whether such individual is paying or is obligated to pay support in more than one jurisdiction, (II) checking of records of such individuals on a periodic basis with Federal, intra-and inter-State, and local agencies, (III) maintaining the data necessary to meet the Federal reporting requirements on a timely basis, and (IV) delinquency and enforcement activities), (ii) the collection and distribution of support payments (both intra- and inter-State), the determination, collection, and distribution of incentive payments both inter- and intra-State, and the maintenance of accounts receivable on all amounts owed, collected and distributed, and (iii) the costs of all services rendered, either directly or by interfaceing with State financial management and expenditure information, (B) to provide interface with records of the State's aid to families with dependent children program in order to determine if a collection of a support payment causes a change affecting eligibility for or the amount of aid under such program, (C) to provide for security against unauthorized access to, or use of, the data in such system, (D) to facilitate the development and improvement of the income withholding and other procedures required under section 466(a) [42 USCS § 666(a)] through the monitoring of support payments, the maintenance of accurate records regarding the payment of support, and the prompt provision of notice to appropriate officials with respect to any arrearages in support payments which may occur, and (E) to provide management information on all cases under the State plan from initial referral or application through collection and enforcement;

(17) in the case of a State which has in effect an agreement with the Secretary entered into pursuant to section 463 [42 USCS § 663] for the use of the Parent Locator Service established under section 453 [42 USCS § 653], provide that the State will accept and transmit to the Secretary requests for information authorized under the provisions of the agreement to be furnished by such Service to authorized persons, will impose and collect (in accordance with regulations of the Secretary) a fee sufficient to cover the costs to the State and to the Secretary incurred by reason of such requests, will transmit to the Secretary from time to time (in accordance with such regulations) so much of the fees collected as are attributable to such costs to the Secretary so incurred, and during the period that such agreement is in effect will otherwise comply with such agreement and regulations of the Secretary with respect thereto;

(18) provide that the State has in effect procedures necessary to obtain payment of past-due support from overpayments made to the Secretary of the Treasury as set forth in section 464 [42 USCS § 664]. and take all steps necessary to implement and utilize such procedures;

(19) provide that the agency administering the plan—

(A) shall determine on a periodic basis, from information supplied pursuant to section 508 of the Unemployment Compensation Admendments of 1976 [29 USCS § 49b; 42 USCS § 603a], whether any individuals receiving compensation under the State's unemployment compensation law (including amounts payable pursuant to any agreement under any Federal unemployment compensation law) owe child support obligations which are being enforced by such agency, and

(B) shall enforce any such child support obligations which are owed by such an individual but are not being met—

(i) through an agreement with such individual to have specified amounts withheld from compensation otherwise payable to such individual and by submitting a copy of any such agreement to the State agency administering the compensation law, or

(ii) in the absence of such an agreement, by bringing legal process (as defined in section 462(e) of this Act [42 USCS § 662 (e)]) to require the withholding of amounts from such compensation;

(21) (A)at the option of the State, impose a late payment fee on all overdue support (as defined in section 466(e) [42 USCS § 666(e)]) under any obligation being enforced under this part [42 USCS §§ 651 et seq.], in an amount equal to a uniform percentage determined by the State (not less than 3 percent nor more than 6 percent) of the overdue support, which shall be payable by the absent parent owning the overdue support; and

(B) assure that the fee will be collected in addition to, and only after full payment of, the overdue support, and that the imposition of the late payment fee shall not directly or indirectly result in a decrease in the amount of the support which is paid to the child (or spouse) to whom, or on whose behalf, it is owed;

(22) in order for the State to be eligible to receive any incentive payments under section 458 [42 USCS § 658], provide that, if one or more political subdivisions of the State participate in the costs of carrying out activities under the State plan during any period, each such subdivision shall be entitled to receive an

appropriate share (as determined by the State) of any such incentive payments made to the State for such period, taking into account the efficiency and effectiveness of the activities carried out under the State plan by such political subdivision; and

(23) provide that the State will regularly and frequently publicize, through public service announcements, the availability of child support enforcement services under the plan and otherwise, including information as to any application fees for such services and a telephone number or postal address at which further information may be obtained.

The State may allow the jurisdiction which makes the collection involved to retain any application fee under paragraph (6)(B) or any late payment fee under paragraph (21).

APPENDIX M

U.S. CONSTITUTION

ARTICLE III

§ 2. [1.] The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made under their authority; - to all cases affecting ambassadors, other public ministers and consuls; - to all cases of admiralty and maritime jurisdiction; - to controversies to which the United States shall be a party; - to controversies between two or more states; - between a state and citizens of another state; - between citizens of different states; - between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

[2.] In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction. In all the other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the congress shall make.

APPENDIX N

25 U.S.C. § Duties of Commissioner

The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations.

APPENDIX O

25 C.F.R. § 11.22. Jurisdiction.

The Court of Indian Offenses shall have jurisdiction of all suits wherein the defendant is a member of the tribe or tribes within their jurisdiction, and of all other suits between members and nonmembers which are brought before the courts by stipulation of both parties. No judgment shall be given on any suit unless the defendant has actually received notice of such suit and ample opportunity to appear in court in his defense. Evidence of the receipt of the notice shall be kept as part of the record in the case. In all civil suits the complainant may be required to deposit with the clerk of the court a fee or other security in a reasonable amount to cover costs and disbursement in the case.

APPENDIX P

25 C.F.R. 11.30. Determination of paternity and support.

The Court of Indian Offenses shall have jurisdiction of all suits brought to determine the paternity of a child and to obtain a judgment for the support of the child. A judgment of the court establishing the identity of the father of the child shall be conclusive of the fact in all subsequent determinations of inheritance by the Department of the Interior or by the Court of Indian Offenses.

APPENDIX Q

45 C.F.R. 302.10 Statewide operations

The State plan shall provide that:

(a) It will be in operation on a statewide basis in accordance with equitable standards for administration that are mandatory throughout the State;

APPENDIX R

45 C.F.R. 303.5 Establishment of paternity.

(a) For all cases referred to the IV-D agency pursuant to § 235.70 of this title or applying under § 302.33 of this chapter in which paternity has not yet been established, the IV-D agency must:

(1) Attempt to establish paternity by court order or other legal process established under State law; or

(2) Establish paternity by acknowledgement if under the State law such acknowledgement has the same legal effect as court-ordered paternity, including the right to benefits other than child support.

(b) The agency need not attempt to establish paternity in any case involving incest or forcible rape, or in any case in which legal proceedings for adoption are pending, if, in the opinion of the IV-D agency, it would not be in the best interest of the child to establish paternity.

(c) The IV-D agency shall identify laboratories within the State which perform legally and medically acceptable tests, including blood tests, which tend to identify the father or exclude the alleged father from paternity. A list of such laboratories shall be available to appropriate courts and law enforcement officials, and to the public upon request.

APPENDIX S

§ 110-141. (Effective July 1, 1986) Effectuation of intent of Article

The North Carolina Department of Human Resources shall supervise the administration of this program in accordance with federal law and shall cause the provisions of this Article to be effectuated and to secure child support from absent, deserting, abandoning and nonsupporting parents.

It is the responsibility of the board of county commissioners to administer, or provide alternative arrangements to the procedure outliined in G.S. 110-130 for designating a local person or agency to administer the provisions of this Article in that county. (1975, c. 827, s. l; 1977, 2nd Sess., c. 1186, s. 16; 1979, c. 488; 1983 (Reg. Sess., 1984), c. 1034, s. 76; 1985, c. 244; c. 479, s. 103.)

APPENDIX T

§ 110-135. Debt to State created.

Acceptance of public assistance by or on behalf of a dependent child creates a debt, in the amount of public assistance paid, due and owing the State by the responsible parent or parents of the child. Provided, however, that in those cases in which child support was required to be paid incident to a court order during the time of receipt of public assistance, the debt shall be limited to the amount specified in such court order. This liability shall attach only to public assistance granted subsequent to June 30, 1975, and only with respect to the period of time during which public assistance is granted, and only if the responsible parent or parents were financially able to furnish support during this period.

The United States, the State of North Carolina, and any county within the State which has provided public assistance to or on behalf of a dependent child shall be entitled to share in any sum collected under this section, and their proportionate parts of such sum shall be determined in accordance with the matching formulas in use during the period for which assistance was paid.

No action to collect such debt shall be commenced after the expiration of five years subsequent to the receipt of the last grant of public assistance. The county attorney or an attorney retained by the county and/or State shall represent the State in all proceedings brought under this section. (1975, c. 827, s. 1; 1977, 2nd Sess., c. 1186, ss.9, 10).

APPENDIX U

§ 110-130. Action by the designated representatives of the county commissioners.

Any county interested in the paternity and/or support of a dependent child may institute civil or criminal proceedings against the responsible parent of the child, or may take up any pursue any paternity and/or support action commenced by the mother, custodian or guardian of child. Such action shall be undertaken by the designated representative in the county where the mother of the child resides or is found, in the county where the father resides or is found, or in the county where the child resides or is found. Any legal proceeding instituted under this section may be based upon information or belief. The parent of child may be subpoenaed for testimony at the trail of the action to establish the paternity of and/or to obtain support of child either instituted or taken up by the designated representative of the county commissioners. The husband-wife privilege shall not be grounds for excusing the mother or father from testifying at the trail nor shall said privilege be grounds for the exclusion of confidential communications between husband and wife. If a parent called for examination declines to answer upon the grounds that his many tend to incriminate him, the court may require him to answer in which event he shall not thereafter be prosecuted for any criminal act involved in the conception of the child whose paternity is in issue and/or for whom support is sought, except for perjury committed in this testimony. (1975, c. 827, s. 1; 1977, 2nd Sess., c. 1186, s.4; 1985, c. 410).

APPENDIX V

45 C.F.R. 302.12

(a) The State plan shall be provide for the establishment or designation of a single and separate organizational unit to administer the IV-D plan. Such unit is referred to as the IV-D agency. Under this requirement:

(1) The IV-D agency may be:

(i) Located in the single State agency designated pursuant to § 205.100 to administer title IV-A of the Act;

(ii) Located in any other agency of the State; or,

(iii) Established as a new agency of the State.

(2) The IV-D agency shall be responsible and accountable for the operation of the IV-D program. Except as provided in § 303.20 of this Part, the agency need not perform all the functions of the IV-D program so long as it insures that all these functions are being carried out properly, efficiently, and effectively;

(3) If the IV-D agency delegates any of the functions of the IV-D program to any other State or local agency or official, or any official with whom a cooperative agreement as described in § 302.34 has been entered into or purchases services from any person or private agency pursuant to § 304.22 of this Part, the IV-D agency shall have responsibility for securing compliance with the requirements of the State plan by such agency or officials.

(b) The State plan shall describe the structure of the IV-D agency and the distribution of responsibilities among the major divisions within the unit, and if it is located within another agency, show its place in such agency. If any of the IV-D program functions are to be performed outside of the IV-D agency then these functions shall be listed with the name of the organization responsible for performing them.

APPENDIX W

42 U.S.C. 603

(h) Reduction in amount; suspension; continuation; determination of substantial compliance by State

(1) Notwithstanding any other provision of this Act, if a State's program operated under part D is found as a result of a review conducted under section 652(a)(4) of this title not to have complied substantially with the requirements of such part for and quarter begining after September 30, 1983, and the Secretary determines that the State's program is not complying substantially with such requirements at the time such finding is made, the amounts otherwise payable to the State under this part for such quarter and each subsequent quarter, prior to the first quarter throughout which the State program is found to be in substantial compliance with such requirements, shall be reduced (subject to paragraph (2) by-

(A) not less than one nor more than two percent, or

(B) not less than two or more than three percent, if the finding is the second consecutive such finding made as a result or such a review, or

(C) not less than three nor more than five percent, if the finding is the third or a subsequent consective such finding made as a result of such a review.

(2) (A) The reductions required under paragraph (1) shall be suspended for any quarter if-

(i) the State submits a corrective action plan, within a period prescribed by the Secretary following notice of the finding under paragraph (1), which contains steps necessary to achieve substantial compliance within a time period which the Secretary finds to be appropriate;

(ii) the Secretary approves such corrective action plan (and any amendments thereto) as being sufficient to achieve substantial compliance; and

(iii) the Secretary finds that the corrective action plan (and any amendement thereto approved by the Secretary under clause (ii), is being fully implemented by the State and that the State is progresssing in accordance with the timetable contained in the plan to achieve substantial compliance with such requirements.

(B) A suspension of the penalty under subparagraph (A) shall continue until such time as the Secretary determines that-

(i) the State has achieved substantial compliance.

(ii) the State is no longer implementing its corrective action plan, or

(iii) the State is implementing or has implemented its corrective action plan but has failed to achieve substantial compliance within the appropriate time period (as specified in subparagraph (A)(i).

(C) (i) In the case of a State whose penalty suspension ends pursuant to subparagraph (B)(i), the penalty shall not be applied.

(ii) In the case of a State whose penalty suspension ends pursuant to subparagraph (B)(ii), the penalty shall be applied as if the suspension had not occurred.

(iii) In the case of a State whose penalty suspension ends pursuant to subparagraph (B)(iii), the penalty shall be applied to all quarters ending after the expiration of the time period specified in such subparagraph (and prior to the first quarter throughtout whith the State program is found to be in substantial compliance).

(3) For purpose of this subsection, section 602(a)(27) of this title, and section 652(a)(4) of this title, a State which is not in full compliance with the requirements of this part shall be determined to be in substantial compliance with such requirements only if the Secretary determines that any noncompliance with such requirements is of a technical nature with does not adversely affect ther performance of the child support enforcement program.

42 U.S.C. 604(d). Reduction in amount payable

After December 31, 1976, in the case of any State which is found to have failed substantially to comply with the requirements of section 602(a)(27) of this title, the reduction in any amount payable to such State required to be imposed under section 603(h) of this title shall be imposed in lieu of any reduction, with respect to such failure, which would otherwise be required to be imposed under this section.

No. 86-1978 (3)

Supreme Court, U.S.
FILED
AUG 7 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1987

JACKSON COUNTY BY AND THROUGH
ITS CHILD SUPPORT ENFORCEMENT
AGENCY Ex rel. ANNETTE JACKSON,

Petitioner,

v.

JOHN WESLEY SWAYNEY,

Respondent.

On Petition For A Writ Of Certiorari
To The North Carolina Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

Jeanette Wolfley
Counsel of Record
Native American Rights Fund
1506 Broadway
Boulder, CO 80302
(303) 447-8760

Attorney for Respondent

August 1987

No. 86-1978

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1987

JACKSON COUNTY BY AND THROUGH
ITS CHILD SUPPORT ENFORCEMENT
AGENCY Ex rel. ANNETTE JACKSON,

Petitioner,

v.

JOHN WESLEY SWAYNEY,

Respondent.

**On Petition For A Writ Of Certiorari
To The North Carolina Supreme Court**

RESPONDENT'S BRIEF IN OPPOSITION

Jeanette Wolfley
Counsel of Record
Native American Rights Fund
1506 Broadway
Boulder, CO 80302
(303) 447-8760

Attorney for Respondent

August 1987

QUESTION PRESENTED

Whether a state court has jurisdiction over a paternity action where the putative father, the mother, and the child are enrolled members of the Eastern Band of Cherokee Indians and reside on the Tribe's reservation, and where the Tribe asserts jurisdiction over such actions pursuant to a comprehensive Tribal Code.

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED.....(i)

STATEMENT OF THE CASE.....1

I. THE STATE COURT DECISIONS OF NEW MEXICO, NORTH DAKOTA AND NORTH CAROLINA ARE NOT IN CONFLICT WITH THE NORTH CAROLINA DECISION.....4

II. THE DECISION BELOW GIVES EFFECT TO WELL-ESTABLISHED PRINCIPLES OF TRIBAL SELF-GOVERNMENT.....10

A. A Paternity Action Is An Internal Matter Governed By Tribal Law.....10

B. The Social Security Act Does Not Confer Jurisdiction To The North Carolina State Courts.....14

CONCLUSION.....16

TABLE OF AUTHORITIES

CASES — PAGE(S)

Fisher v. District Court,
424 U.S. 382 (1976).....12, 13

King v. Smith,
392 U.S. 309 (1968).....15

McClanahan v. Arizona State
Tax Comm'n, 411 U.S. 164 (1973).....11

McKenzie County Social
Services Board, S.N.F.,
through Michon Sax as Guardian
Ad Litem and C.F.V.V.G.,
392 N.W.2d 399 (N.D. 1986),
cert. denied, 55 U.S.L.W. 3643
(March 24, 1987) (No. 86-996)....5, 7, 9

Rice v. Olson, 324 U.S.
786 (1945).....13

Santa Clara Pueblo v.
Martinez, 436 U.S. 49 (1978).....10-11

State ex rel. Department
of Human Services
v. Jojola, 99 N.M.
500, 660 P.2d 590
(1983), cert. denied,
464 U.S. 803 (1984).....5, 6, 7

United States v. Dion,
476 U.S. ____, 90 L.Ed.2d
767 (1986).....15

United States v. Kagama,
118 U.S. 375 (1886).....12

United States v. Mazurie,
419 U.S. 544 (1975).....11

CASES (continued) PAGE(S)

United States v. Quiver,
241 U.S. 602 (1916).....12

United States v. Wheeler,
435 U.S. 313 (1978).....12

White Mountain Apache
Tribe v. Bracker, 448
U.S. 136 (1980).....11

Williams v. Lee, 358
U.S. 217 (1959).....8, 11, 12

OTHER

45 C.F.R. §303.5.....15

Cherokee Code §110-3.....2

Cherokee Code §110-17.....2

Cherokee Code §110-5.....2

STATEMENT OF THE CASE

Respondent John Wesley Swayney is a citizen of the United States and an enrolled member of the Eastern Band of Cherokee Indians. Respondent resides on the Reservation which is within the State of North Carolina. The Reservation is located in portions of Swain, Jackson, Graham, Cherokee and Haywood Counties.

On April 12, 1982, Petitioner Jackson County Child Support Enforcement Agency filed a paternity action in state court to have respondent declared the father of Kevin Jackson, and to collect a debt owed to the state for public assistance, Aid to Families with Dependent Children (AFDC), paid for Kevin Jackson's benefit. Annette Jackson, mother of Kevin Jackson, and Kevin are enrolled members of the Eastern Band of Cherokee Indians residing on the

Reservation. Annette Jackson applied for and received benefits from the Jackson County Department of Social Services which is located on the Reservation.

The Cherokee tribal court system was created by the Cherokee Tribe in July 1980 pursuant to Tribal Resolution. The Tribe has enacted an ordinance providing for tribal court jurisdiction over actions to establish paternity and child support (§ 110-17; § 110-3 - § 110-5, The Cherokee Code). Since 1982, Swain, Graham, Cherokee and Haywood Counties have filed 87 cases in the Cherokee Tribal Court. Currently there are 53 cases pending in the Tribal Court. The Tribal Court collects child support from Indian fathers and forwards it to the North Carolina Department of Social Services. No paternity or child support cases have been filed in the Cherokee

Tribal Court by the Jackson County Child Support Enforcement Office.

On July 16, 1984, the district court granted respondent's motion to dismiss based on lack of subject matter jurisdiction and lack of personal jurisdiction. Petitioner appealed to the Court of Appeals which affirmed the lower court's finding of lack of subject matter jurisdiction on the ground that federal law preempted state court jurisdiction over the matter. Additionally, the Court of Appeals reversed the finding of lack of personal jurisdiction.

Petitioner appealed to the North Carolina Supreme Court. The Supreme Court first found that the exercise of state court jurisdiction over actions to collect debts owed to the state for public assistance and to obtain a judgment for future child support did not infringe on

tribal self-government, even under the facts of this action. Respondent by separate petition seeks a writ of certiorari as to this portion of the North Carolina Supreme Court decision. However, the Supreme Court held that the exercise of state court jurisdiction over paternity actions unduly infringes on tribal self-government. The Court remanded the case to the Court of Appeals. If paternity is contested, the district court ordered proceedings stayed pending disposition in the Cherokee Tribal Court. Petitioner seeks review of the North Carolina Supreme Court decision, upholding tribal jurisdiction over the paternity action.

I. THE STATE COURT DECISIONS OF NEW MEXICO, NORTH DAKOTA AND NORTH CAROLINA ARE NOT IN CONFLICT WITH THE NORTH CAROLINA DECISION

Petitioner argues that the decision below is in conflict with the results of

two other state Supreme Court cases: State ex rel. Department of Human Services v. Jojola, 99 N.M. 500, 660 P.2d 590 (1983), cert. denied, 464 U.S. 803 (1984); McKenzie County Social Services Board, S.N.F., through Michon Sax as Guardian Ad Litem and C.F.V.V.G., 392 N.W.2d 399 (N.D. 1986), cert. denied, 55 U.S.L.W. 3643 (March 24, 1987) (No. 86-996). In Jojola, the New Mexico Department of Human Services instituted a paternity action and collection of a child support debt against Jimmy Jojola. Mr. Jojola, the mother and child were all residents and members of the Isleta Pueblo. The New Mexico Supreme Court held that the exercise of state court jurisdiction over the paternity action did not infringe on tribal self-government. The Court reasoned that the mother assigned her right to child support to the Department of Human Services, and thus the

action could be characterized as a non-Indian versus Indian action. Also, the court found the cause of action arose outside the reservation because the mother applied for public assistance off the reservation. The Court, however, did not discuss the tribal interests at stake.

Jojola petitioned for certiorari to this Court. Jojola v. State ex rel. Department of Human Services, (June 1983) (No. 82-2049). During the appeal, the State of New Mexico filed a Motion to Dismiss because events subsequent to the New Mexico Supreme Court decision rendered the case moot. The State of New Mexico argued that the State had issued a policy statement which directed, "that in all such cases, in which the mother, putative father, and child are Indians who reside on the reservation, the paternity action shall be filed in the Tribal Court of competent

jurisdiction. . . . The Department codified its policy decision to defer to Indian tribal sovereignty in paternity determinations such as presented here." Motion of Appellee To Dismiss at 4,5, Jojola v. State ex. rel., Department of Human Services, (June 1983) (No. 82-2049). The State dismissed its action in state court on the grounds that the paternity issue would be pursued in the Tribal Court of Isleta. Thus, while the New Mexico Supreme Court decision is not technically moot, the State has deferred to tribal court jurisdiction. Therefore, there is no conflict with the North Carolina Supreme Court decision upholding tribal court jurisdiction over paternity actions.

McKenzie County, 392 N.W. 2d 399, involved members of the Three Affiliated Tribes of the Fort Berthold Reservation. The mother obtained benefits from the North

Dakota Department of Social Services for her child and alleged the father of her child was V.G. The McKenzie County Board of Social Services filed suit in state court to establish paternity and to collect child support paid to the mother. The North Dakota Supreme court held that state court jurisdiction would infringe on tribal self-government citing Williams v. Lee, 358 U.S. 217 (1959). This decision comports with the North Carolina decision.

In this case, the North Carolina Supreme Court found that state court jurisdiction over a paternity matter infringed on the right of the Cherokee Tribe to make laws and be governed by them. The Supreme Court reviewed the Jojola case and rejected the New Mexico's Supreme Court's determination that because the cause of action arose off the reservation then the state courts should

have jurisdiction. Instead, the Court ruled that the basis of suit is a determination of parentage, not the location where benefits were obtained. Accordingly, this is purely an internal tribal matter which is within the exclusive jurisdiction of the Tribe.

This case and McKenzie County affirm the long-standing principle that Indian tribes have jurisdiction over civil matters within their boundaries. Like this case and McKenzie County, the State of New Mexico has deferred to tribal court jurisdiction in paternity matter. Therefore, there is no conflict in the State courts over which court (tribal or state) has jurisdiction over paternity matters. All the results uphold tribal self-government.

II. THE DECISION BELOW GIVES EFFECT TO WELL-ESTABLISHED PRINCIPLES OF TRIBAL SELF-GOVERNMENT

A. A Paternity Action Is An Internal Matter Governed By Tribal Law

The court below correctly found that a paternity action is an internal domestic matter of great significance to the Cherokee Tribe. One cannot imagine an issue more basic to the self-government and determination of a separate people than the right to establish parentage and the family relationship. The determination of paternity is inclusive of membership in the Cherokee Tribe. As recognized by this Court, "[a] tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence. . . . [T]he judiciary should not rush to create causes of action that would intrude on these delicate matters." Santa Clara Pueblo v. Martinez, 436 U.S.

49, 72 n. 32 (1978). Thus, allowing a paternity action to be filed in state court would abrogate tribal decisionmaking on membership, unsettle the Cherokee Tribe's ability to maintain authority of internal matters, and disrupt the whole of tribal government.

It is well settled that on such basic matters of membership tribal Indians have a right to make their own laws and be governed by them. Williams v. Lee, 358 U.S. 217, 223 (1959); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973). This Court has continued to stress that "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory," White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980), quoting United States v. Mazurie, 419 U.S. 544, 557 (1975). Indeed, this Court has maintained that

tribal forums have exclusive jurisdiction over the domestic relations of their members, United States v. Quiver, 241 U.S. 602 (1916); Fisher v. District Court, 424 U.S. 382 (1976), which includes "the power of regulating their internal and social relations," United States v. Kagama, 118 U.S. 375, 381-82 (1886), cited in United States v. Wheeler, 435 U.S. 313, 322 (1978).

In Williams v. Lee, 358 U.S. 217, this Court forbade the exercise of state jurisdiction where it would undermine the authority of tribal courts over reservation affairs and hence would infringe upon the right of the Indians to govern themselves. That action involved a non-Indian trader, who sued an Indian in Arizona state court to collect for goods sold him on credit at a reservation trading post. This Court set forth the test for state court jurisdiction

over causes of action arising in Indian country with an Indian defendant as:

> Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.

358 U.S. at 220. The Williams test reinforces the fact that "[t]he policy of leaving Indians free from state jurisdiction is deeply rooted in the Nation's history." Rice v. Olson, 324 U.S. 786, 789 (1945).

This Court applied the infringement test in an adoption proceeding, where all were members of the Northern Cheyenne Tribe residing on the Reservation and the dispute arose on the Reservation. Fisher v. District Court, 424 U.S. 382 (1976). In Fisher, this Court held that state court jurisdiction would interfere with tribal self-government, and stated,

> State-court jurisdiction plainly would interfere with the powers of self-government conferred upon the Northern Cheyenne Tribe and exercised through the Tribal Court. It would subject a dispute arising on the reservation among reservation Indians to a forum other than the one they have established for themselves. [footnote omitted]. As the present record illustrates, it would create a substantial risk of conflicting adjudications affecting the custody of the child and would cause a corresponding decline in the authority of the Tribal Court.

424 U.S. at 387-388.

B. <u>The Social Security Act Does Not Confer Jurisdiction To The North Carolina State Courts</u>

The petitioner argues that this case should be reviewed because there are a number of federal entitlement programs which mandate the states to pursue certain legal actions in state courts and are silent as to the jurisdiction of these courts over matters arising on Indian

reservations. The only act in question in this case is the Social Security Act which requires the State to comply with the federal requirements for the AFDC programs. King v. Smith, 392 U.S. 309 (1968). The court below made no broad findings which would impact other federal programs administered by states. The court correctly found that under 45 C.F.R. §303.5 the state could resort to the Tribal Court. The decision does not qualify for review by this Court.

Furthermore, the congressional intent to authorize the intrusion of state courts upon the jurisdiction of tribal courts must be clear and plain. The Social Security Act, a general federal statute, does not meet the standard enunciated by this Court. United States v. Dion, 476 U.S. ___, 90 L.Ed.2d 767, 773 (1986).

CONCLUSION

The petition for Writ of Certiorari should be denied.

Respectfully submitted,

Jeanette Wolfley
Counsel of Record
Native American Rights Fund
1506 Broadway
Boulder, CO 80302
(303) 447-8760

Attorney for Respondent

August 1987